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ON THE CONTEMPORARY HUNGARIAN LEGAL SYSTEM

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Phone: +36 (96) 613-642
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Széchenyi István University
Deák Ferenc Faculty of Law and Political Sciences
Batthyány Lajos College
12 Budai út, 9027 Győr, Hungary
email: szeblszk@gmail.com
http://blszk.sze.hu

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Editor:

János KÁLMÁN

Authors:

András CZEBE
Csaba ERDŐS
Ádám FARKAS
Júlia FEHÉR
Csilla GÖMBÖS
Laura HEGEDŰS
István HORVÁTH
János KÁLMÁN
Roland KELEMEN
Barna Arnold KESERŰ
László KNAPP
János KRIZSÁN
Márta PATAKI
Alex PONGRÁCZ
Dávid PONGRÁCZ
Tamás SZENTGYÖRGYVÁRI
Máté TRENYISÁN
Lilla VULCZ

Language supervision by:
Boglár SÁNDOR and **Orsolya SZALAY**

This book was reviewed by:
Dr. Gábor HULKÓ, Ph.D. senior lecturer
Dr. Gábor KECSKÉS, Ph.D. senior lecturer

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Foreword

"The iron itself cannot take a stand against the rain, and humans are just like iron. If used for work it wears off, if lying on the ground, it gets rusted. As we ought to fall at the end, it is a hundred times better to be worn off than to become rusty."

József Eötvös

Four years ago, the Batthyány Lajos College's community, operating under the aegis of Deák Ferenc Faculty of Law and Political Sciences, made a promise to share the Faculty's most talented students' works with Hungary. To achieve it, we set forth the College's own scientific periodical called *Diskurzus*, which is published annually twice and is electronically accessible for everyone. Besides the periodical, the College's volume study – published in every two years – was born, collecting the College students' greater works into one volume.

On the autumn of 2013, the College had a huge dream and felt itself strong enough to share its students' scientific work not only with Hungary but the whole world. The Beloved Reader is holding the product of the College community's sacrificing work and desire in his/her hands.

According to Kunó Klebelsberg: "*as regards effect in foreign countries, not passive but active language knowledge is needed*." By truly agreeing with this thought, with finishing this volume the College also proved that its students possess those skills and abilities which make them able to succeed in Europe and all over the world, as they are hard-working, persistent, humble and most importantly, talented.

Keeping Eötvös' thoughts in mind, the College has always approached scientific questions with professional modesty, and we never kept it in secret that we await high professional level from our members even when they are students. As this is the aim of talent

promotion! Talent must not be left unused, just like iron may not be wasted, either. Talent manifests when it gets those aims for which it is worth doing something, working.

Regarding this volume, the aim was to present the College's scientific results in foreign languages, with which we demonstrated that we are Hungarian in our way of thinking but we are also connect to a greater community, the European Union with thousand threads. As the Latin saying goes, *quot capita, tot sententiae*, bearing this in mind, the volume's scientific results cannot be gathered around one thought, their common point is belonging to the College. However, this provides possibility for the Beloved Reader to easily find the work that suits one's interests the best.

Honour and obeisance behoves to the volume's two professional reviewer, *Dr. Gábor Hulkó* and *Dr. Gábor Kecskés*, who carried out a unique work regarding the studies' professional proof-reading. *Sándor Boglár* and *Orsolya Szalay* shall be honoured as well, they did the studies' language supervision. We also say thank you to the *Emberi Erőforrás Támogatáskezelő* and the *Hungarian Institute of Educational Research and Development*, which made it possible to publish the volume. Last but not least, we owe special thank for the *authors*, who proved that the Faculty of Law and Political Sciences in Győr is the area's torch sparkling with the most glorious light.

dr. János Kálmán
editor

András CZEBE

How Act C of 2012 Transformed the Regulation of Violent Sexual Crimes in Hungary

1. INTRODUCTION

After the change of regime, the rather differentiated Hungarian governments followed different criminal policies which significantly transformed the penal provisions established by Act IV of 1978. As a result, Act C of 2012 on Criminal Code was enacted on 1st July 2013. This transformation is also due to the accelerating scientific progress and the harmonization of law caused by the accession to the European Union.[1]

How Act C of 2012 transformed the regulation of violent sexual crimes		
Act IV of 1978		*Act C of 2012*
Chapter XIV: Crimes against connubiality, family, youth and sexual morality	➡	*Chapter XX:* Offenses against children and against family law *Chapter XIX:* Sexual freedom and sexual offenses
197. § Rape *198. §* Sexual assault	➡	*197. §* Sexual violence
"sexual extortion"	➡	*196. §* Sexual exploitation

1. table (edited by the author)

[1] Justification of Act C of 2012 on Criminal Code.

2. SEXUAL FREEDOM AND SEXUAL OFFENSES AS AN INDEPENDENT CHAPTER

As it can clearly be seen from the table above, the previously effective Criminal Code disposed crimes against marriage, family, youth and sexual morality in chapter XIV, which was broken down into two independent chapters by Act C of 2012: chapter XX – offenses against children and family law – and chapter XIX – on sexual freedom and sexual offenses.

The new chapter more specifically expresses the defended legal matters because sexual integrity, sexual self-determination and sexual freedom appear besides sexual morality as previously dominating legal matters, therefore, it not only concentrates on public interest but on the private sector, too.[2] This can be positively interpreted regarding Hungarian legal literature formulated in the recent decades, which requires the creation of a new chapter, as sexual morality itself is inappropriate as the protected legal interest of sexual crimes.

The modified chapter above was also justified by international legislations like the annual Convention in New York in 1950, the 182 ILO Convention, the Optional Protocol to the Convention on the Rights of the Child, the Lanzarote Convention, the CAHVIO Convention and Directive 2011/93/EU of the European Parliament and the Council. These documents hold such social and international demands among these criminal offenses which emphasize the defense of persons under eighteen years of age. Therefore, significant changes took place in the structure and content of violent sexual crimes, listed under chapter XIX in the new Criminal Code. New concepts and new conclusions were formed, creating consistency with international terms; such as the factum of sexual violence which combines rape and sexual assault, the factum of sexual exploitation in order to fix the sanctioning of sexual extortion,

[2] Ibid.

and the concept of sexual activity which attempts to resolve the conceptual problem caused by sexual intercourse and lewd act.

Criminal offenses under the effective chapter can be put into three categories based on their common legal matters:

1. crimes against sexual freedom, like sexual exploitation and sexual violence;
2. crimes against children's healthy sexual development like sexual abuse, exploitation of child prostitution, and child pornography;
3. and crimes against sexual relationship policies adopted by the society like incest, assisting prostitution, living from earnings from prostitution, and indecent exposure.[3]

3. SEXUAL EXPLOITATION AS NEW STATUTORY PROVISION

3.1. Legal reasons behind the modification

Act IV of 1978 penalized rape and sexual assault if sexual intercourse or lewd act was realized by violence or imminent duress against life or bodily integrity. The legal practice of this period certified sexual act as duress if it was implemented by an unqualified threat without the voluntary consent of the injured party.[4] Legislators responded with a new statutory approach to it, called sexual exploitation, which punished the so-called sexual extortion more severely than before. Therefore, the regulation turned towards a different direction which is preferred by domestic and international legal aid organizations and associations.

The creation of sexual exploitation – as a new statutory provision – was justified by the Lanzarote Convention and Directive

[3] BELOVICS, ERVIN – MOLNÁR, GÁBOR MIKLÓS – SINKU, PÁL: *Büntetőjog II. Különös rész. A 2012. évi C. törvény alapján* [Criminal Law II. – Specific Part. Based on Act C of 2012], 2012, HVG-ORAC, Budapest, 172.
[4] Act IV of 1978 on the Criminal Code, Art. 174., Art. 197. para. (1), Art. 198. para. (1).

2011/93/EU of the European Parliament and the Council, and declares the following crimes as punishable:

1. engaging in sexual activity with a person under eighteen years of age where coercion, force or threats is used; or
2. applying abuse based on a recognized position of trust, authority or influence over a child, including abuse within the family; or
3. applying abuse in a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.[5]

Directive 2011/93/EU also determines the lowest limit of the sentence's upper limit and places the crime committed to the injury of the parties – who do not reach the consent age limit – under severe judgment. Consequently, sexual exploitations committed to the injury of parties under eighteen and fourteen years of age appear as qualified cases in Act C of 2012. Furthermore, if sexual exploitation is committed by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or, if abuse is applied based on a recognized position of trust, authority or influence over the victim, it is considered as a qualified case, as well. The recognized position of authority or influence – between the perpetrator and the injured party – is a newly formulated constituent element which is beyond those previously described relationships but is capable of giving rise to other personal or appending relations like a cousin or a neighborly relation. Additionally, this factum is able to transpose the provisions of the CAHVIO Convention as it encompasses every coercive behavior that causes the injured party not to consent voluntarily.[6]

[5] The Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (hereinafter: Directive 2011/93/EU), Art. 3. para. (5) (III), and the Lanzarote Convention, Art. 18. para. (1) point (b).

[6] Justification of Act C of 2012 on the Criminal Code.

3.2. Detailed examination of the relevant statutory provision

The protected legal interest behind sexual exploitation is the social interest regarding freedom of sexual life of human beings. Sexual freedom behooves every living natural person on a basic legal level, therefore, the existence of total legal capacity is not a condition of passive subjectivity, namely, people over twelve or with diminished capacity can become passive subjects of sexual exploitation without further restriction. This raises the question: whether the complete absence of criminal capacity would impact passive subjectivity of sexual exploitation. The answer is no if the injured party is incapable of demonstrating consent in relation to sexual activities and sex practices.

Both expressions of criminal conduct are clearly visible from the factum of sexual exploitation, namely, the coercion to perform or tolerate sexual activities. Sexual act appeared as a new criminal concept in Act C of 2012, which means sexual intercourse and any gravely indecent and obscene act primarily for sexual purposes, intended to simulate or satisfy sexual desire. Besides sexual intercourse, it refers to sexual activities which correspond to lewd act in the common parlance.[7]

In my opinion, – with the creation of this definition – legislators solved the conceptual problem caused by sexual intercourse and lewd act,[8] as sexual intercourse – during the commitment of violent sexual crimes – can be interpreted as part of the lewd act and also concluded as a criminal conduct.

One actively cooperates as long as the injured party is forced to perform sexual activity. In the case of tolerance, cooperation turns into passive conduct.

[7] Act C of 2012 on the Criminal Code, Art. 459. para. (1) point 27.

[8] NAGY, FERENC – SZOMORA, ZSOLT: A házasság, a család az ifjúság és a nemi erkölcs elleni bűncselekmények (Btk. XIV. fejezet) de lege ferenda [Crimes Against Connubiality, Family, Youth and Sexual Morality, Chapter XIV, De Lege Ferenda], in *Büntetőjogi Kodifikáció*, Vol. 2. No. 18. (2004) 18.

The factum of sexual exploitation can only be implemented with violence or threat. In this case, violence is only factual if it is directed against a person or its nature bends will. Threat is to be understood as a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such declaration.[9] The first half of the definition is called the material side, while its second half is called the subjective side. As a result, the injured party acts contrary to his/her free will.[10]

Sexual exploitation is classified as a materialistic criminal offense which results in the sexual act itself or the toleration of sexual act against the passive subjects' free will. Perpetrators will be held accountable for attempting sexual exploitation if they begin the threat without totally performing it. Otherwise, offense is considered as consummated.

The offender of sexual exploitation can be anyone. Complicity occurs if the offender, knowingly and voluntarily, helps another person to commit the crime. The basic case of sexual exploitation may relate to abetting or aiding. This criminal activity can only be implemented with the offender's straight intent.[11]

4. SEXUAL VIOLENCE AS NEW STATUTORY PROVISION

4.1. Legal reasons behind modification

The re-regulation of rape and sexual assault was necessary because Hungary signed the Lanzarote Convention on 29th November 2010, and EU Member States accepted Directive 2011/93/EU in December 2011, which declare the following crimes as punishable:

1. engaging in sexual activities with a person under eighteen years of age where coercion, force or threat is used; or

[9] Act C of 2012 Art. 459. para. (1) point 7.

[10] SZOMORA, ZSOLT: Az erőszakos nemi bűncselekmények kényszerítési eleméről [Coercion during violent sexual crimes], in *Büntetőjogi Kodifikáció*, Vol. 8. No. 2. (2008) 30.

[11] BELOVICS – MOLNÁR – SINKU: *op. cit.* 174.

2. applying abuse based on a recognized position of trust, authority or influence over a child, including abuse within the family; or
3. applying abuse in a particularly vulnerable situation of a child, notably because of a mental or physical disability, or a situation of dependence.[12]

Both legislations use the word child on persons under eighteen years of age. Directive 2011/93/EU also determines the lowest limit of the sentence's upper limit and it places the crime committed to the injury of parties – who do not reach the consent age limit – under severe judgment, which is also normative for the Hungarian legislation.

Act IV of 1978 penalized rape and sexual assault if sexual intercourse or lewd act was realized by violence or imminent duress against life or bodily integrity.[13] Over the years this case-law has become clearer, which made the interpretation and application of duress and qualified threat unified. Therefore, Act C of 2012 continued to apply it. Accordingly, the basic case of sexual violence is committed when the perpetrator uses force or threat against the life or bodily integrity of the victim to perform or tolerate sexual act.

Consequently, sexual exploitations committed to the injury of the parties under fourteen and twelve years of age appear as qualified cases having regard to Directive 2011/93/EU. Furthermore, a qualified case can be realized more than once at the same time.[14]

In the case of the previous legislation, sexual relationship established with a person under twelve years of age entailed the fact of rape or sexual assault. Furthermore, criminal liability was established on the fact of seducement in case of victims between twelve and fourteen years of age. With the creation of Act C of 2012, legislators repealed the presumption, which deemed persons under

[12] Directive 2011/93/EU, Art. 3. para. (5) (III), and the Lanzarote Convention, Art. 18. para. (1) point b).
[13] Act IV of 1978 on the Criminal Code, Art. 174., Art. 197. para. (1), Art. 198. para. (1).
[14] Directive 2011/93/EU Art. 3., Art. 5. para. (2)-(3), Art. 6.

twelve as incapable of defense. This can be explained by the fact that the new Criminal Code explicitly refers to the age of victims. Therefore, Act C of 2012 assigns a higher range of punishment to sexual violence.[15] Namely, legislators solved the dogmatic problem[16] which stemmed from the commitment against victims under twelve.

In addition, the new Criminal Code punishes the assurance of necessary or facilitating conditions of sexual violence regarding its seriousness. This primarily involves the preparation of the scene and the guaranteeing of narcotics.[17]

4.2. Detailed examination of the relevant statutory provision

The protected legal interest behind sexual violence – similarly to sexual exploitation – is the social interest regarding freedom of sexual life of human beings. Its passive subject can be anyone regardless of age and gender.

The criminal conduct of sexual violence has two expressions: sexual exploitation and consumption for sexual act. Sexual act appears as a common element in both expressions. The concept of sexual intercourse in criminal context is worth to consider. According to previous legislations, sexual intercourse was consummated if genital contact occurred with sexual intent.[18] This approach is no longer maintained. According to the special provisions of the new Criminal Code, sexual intercourse can be interpreted as part of lewd act and also concluded as a criminal conduct.

Sexual exploitation – as the first expression of the criminal offence – can be committed with two interdependent acts, namely, with sexual act and coercion. There is an objective and instrumental relation between these conducts in which sexual intercourse appears as an objective action while coercion appears as an instrumental

[15] Act C of 2012 on the Criminal Code, Art. 197.
[16] TÓTH: *op. cit.* 298.
[17] Justification of Act C of 2012 on the Criminal Code.
[18] BELOVICS – MOLNÁR – SINKU: *op. cit.* 177.

action. Sexual violence's second expression is realized by the sexual act itself.

The method of perpetration needs to be evaluated in both expressions. Sexual violence is punishable if committed by force or threat against life or bodily integrity of the victim or a person is exploited who is incapable of self-defense or unable to express his/her will for the purpose of sexual act:

1. Violent conduct shall mean any act of aggression and undue influence exerted on a person by the application of physical force, even if it does not result in bodily injury.
2. The concept of threat sets dual barriers in the case of sexual violence. It marks those values which threat should be directed against and also refers to its direct nature. Namely, threat should be directed against the life or bodily integrity of the victim and it should be suitable to break victims' own will. By the latter we mean the implication of psychical impact which results in the detriment of the victim.
3. When injured parties are incapable of defense, they are unable to perform physical resistance against the attacks launched against them. Persons who are temporarily or permanently unable to express their resistance fall into this category, as well.[19]
4. When victims are incapable of exercising free will, they are unable to perform resistance physically, which can be transitional – for example sleep, faint, intoxication or narcosis – and permanent nature – in case of mental incapacity. The latter nature can be remedied differentially because the victim is capable of exercising free will during his/her diminished capacity. Therefore, criminal offence is not implemented in case of agreement. In the case of lacking criminal capacity the subject under examination is the extent of incapability of exercising free will. If injured parties prove

[19] Act C of 2012 on the Criminal Code, Art. 459. para. (1) point 29.

to be capable of exercising free will in respect of sexual activity, their consents are legally relevant.[20]

Sexual violence should be judged if perpetrators commit a sexual act with a person under the age of twelve or force such person to perform sexual act. With the creation of Act C of 2012, legislators repealed the indisputable presumption which deemed persons under twelve as incapable of defense.[21]

Sexual violence is classified as a materialistic criminal offense which results in sexual activity. Perpetrators can be hold accountable for attempting sexual violence if they begin the coercion without totally performing it. Art. 197. para. 5 records the preparation of the criminal conduct, namely, any person who provides the means necessary for or facilitating the commission of sexual violence is guilty. This primarily involves the preparation of the scene or the guaranteeing of narcotics.[22]

The perpetrator of sexual violence can be anyone irrespective of gender or sexual capacity. Complicity occurs if the person performing the periodic behavior is different from the person performing the sexual act. If sexual act is committed by two or more people jointly – knowing each other's activity – they become independent perpetrators of sexual violence, namely, it will be judged as an aggravating circumstance.[23] Sexual violence – similarly to sexual exploitation – can only be implemented with the perpetrator's straight intent.

The aggravating circumstances of sexual violence can be found under Art. 197. para. 3 and 4. The penalty is more severe if sexual violence is committed:

1. against a person under the age of eighteen; or
2. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from

[20] BELOVICS – MOLNÁR – SINKU: *op. cit.* 178.
[21] Act C of 2012 on the Criminal Code, Art. 197. para. (2).
[22] Act C of 2012 on the Criminal Code, Art. 197. para. (5).
[23] Act C of 2012 on the Criminal Code, Art. 197. para. (3) point c).

such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or

3. by more than one person on the same occasion,[24] in full knowledge of each other's acts;[25] or
4. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or by more than one person on the same occasion, in full knowledge of each other's acts against a person under the age of twelve; or[26]
5. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or by more than one person on the same occasion, in full knowledge of each other's acts against a person who has reached the age of fourteen.[27]

The counting of sexual violence adjusts to the number of victims. In other words, multiple sexual activities performed by the same perpetrator at the same time against the same victim forms a natural union, while a sexual act performed with unified determination in different times against the same victim eventuates cumulativeness.

Sexual violence can be judged in a conglomeration with sexual exploitation if the perpetrator continues to perform sexual activities with the victim who became twelve years of age. Formal deficiency forms if the perpetrator violates the victim's personal freedom during sexual violence but if it is separated in time and space, accumulation should be judged. Simple factor merges into the basic factum every

[24] Bkv. 27.
[25] Act C of 2012 on the Criminal Code, Art. 197. para. (3).
[26] BELOVICS – MOLNÁR – SINKU: *op. cit.* 180.
[27] Act C of 2012 on the Criminal Code, Art. 197. para. (4).

time, if it was committed as the result of sexual violence.[28] Aggravated factor is recognized as an exception, which accumulates with sexual violence. Homicide committed with malice aforethought or with malicious motive should be judged if homicide takes place in the course of sexual violence. Mortality caused by factor should be judged in accumulation with sexual violence, if the result occurs by the negligence of the perpetrator.

5. THE PROBLEM OF THE OPERATIVE REGULATION

The previous legislation penalized rape and sexual assault within the context of violent sexual crimes to which Hungarian legal literature responded with strong criticism. This criticism included the unsuitable legal matter of violent sexual crimes, the statutory indeterminacy of sexual intercourse, incorrect formulation of lewd act, passive subjectivity of persons under twelve years of age, concentration of factums, and modification of the chapter.[29]

In my opinion, Act C of 2012 can be positively interpreted based on the critics mentioned above. Namely, the operative Criminal Code penalizes violent sexual crimes under a new and independent chapter. The new Chapter more specifically expresses the defended legal interests because sexual integrity, sexual self-determination and sexual freedom appear besides sexual morality as the previously dominating legal interest.[30] New concepts and new conclusion of facts were formed, creating consistency with international terms such as the fact of sexual violence which combines rape and sexual assault, the fact of sexual exploitation in order to fix the sanctioning of sexual extortion, and the concept of

[28] Bkv. 34.

[29] TÓTH, ÁRON LÁSZLÓ: A nemi erkölcs ellen erőszakos bűncselekmények hatályos szabályozásával kapcsolatos néhány problémáról [A few problems connected to the current legal regulation of violent crimes against sexual morals], in *Iustum, Aequum, Salutare,* Vol. 3. No. 4. (2007) 235.

[30] Justification of Act C of 2012 on the Criminal Code.

sexual activity, which resolves the conceptual problem caused by sexual intercourse and lewd act. During the detailed examination of violent sexual crimes I noticed the following problem.

The perpetrator of sexual exploitation uses violence or threat – under the statutory definition of duress[31] –, which causes the victim to perform or tolerate sexual act.[32] This factum also appears in the first expression of the criminal conduct of sexual violence as legislators bound the mode of perpetration to violence and limited threat.[33]

Therefore, the problem of operative regulation is the duplication of violence as the mode of perpetration. In my opinion, this will be a key problem of judicial discretion in the future because legal separation of the examined criminal conducts raises further questions.

Proposal to solve the existing problem of the operative regulation		
Sexual exploitation		
196. § (1) Any person who *forces* another person to perform or tolerate sexual activities is guilty of felony.	➡	*196. § (1)* Any person who *threatens* another person to perform or tolerate sexual activities is guilty of felony.

2. table (edited by the author)

By making the statutory definition of sexual exploitation more specific, it can solve the dogmatic problem shown above. Namely, emphasizing threat on which sexual extortion is based and neglecting violence. My train of thought is based on the fact that perpetrators psychologically – instead of physically – influence victims during sexual extortion.

[31] Act C of 2012 on the Criminal Code, Art. 195.
[32] Act C of 2012 on the Criminal Code, Art. 196. para. (1).
[33] Act C of 2012 on the Criminal Code, Art. 197. para. (1) point a).

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[5] The Lanzarote Convention.
[6] Bkv. 27.
[7] Bkv. 34.

Csaba ERDŐS

Hungarian Parliamentary Law under the Control of the Strasbourg Court

1. INTRODUCTION

The Hungarian Parliamentary Law has been totally renewed in the last few years: on 1st January 2012, the new constitution – the so-called Basic Law – came into effect. After the enforcement of the Basic Law, other sources of parliamentary law were also remade: a brand new act on Parliament[1] was passed and Standing Orders[2] were shortened due to the Parliament Act.

The Parliament Act regulates the parliamentary discipline law in detail and it ensures new and broad competences in this field for the speaker,[3] the president of the Parliament (hereinafter: President) and for the plenary seat of the Parliament. In 2012 and 2013, disciplinary instruments were applied several times.

Other fields of parliamentary law were affected by the renovation of sources of parliamentary law but there a lot of institutions and issues operated similarly to the former regulation. One of these characteristics is the lack of legal control over the parliamentary decisions. For example, the decisions of the speaker or the president and the single – non-normative – resolutions of the Parliament shall not be questioned from legal point of view.

[1] Act XXXVI of 2012 on the National Assembly (hereinafter: Parliament Act).

[2] Resolution 46/1994 OGY on several rules of standing orders (hereinafter: Standing Orders).

[3] For the sake of convenience "speaker" means the person who leads the plenary seat. According to the Parliament Act speaker shall be the president of the Parliament and the vice-presidents of the Parliament.

Although, there is a political control – the affirmation of plenary seat – against several decisions of the speaker or the president but in these cases the Parliament's decision is also devoid of any type of legal control: the Parliament's decision is the final one. The lack of the legal control is really interesting in those cases when the Parliament, speaker or the president shall apply – and not make – the law: for example decisions made in the field of disciplinary law. For imposing a disciplinary sanction, the Parliament (speaker or the President) shall collate Parliament Act's norms and the behaviour of a Member of the Parliament (hereinafter: MP) and decide whether the regulation and the facts shall indicate the imposition of a sanction. From this point of view, the speaker's and the Parliament's decision-creating is analogical with a judicial decision-creating.

In the last four years, the inner-parliamentary "political" control of the speaker's or president's decisions was affectless due to the two-third majority of the governmental coalition. According to the common political power relations of parliamentarism, the Hungarian parliamentary law's only political "brake" is the two-third majority in several decisions: in a typical situation the governmental side does not have a two-third majority, so this type of majority shall function as a special veto right for the opposition.

The new disciplinary competences, the lack of legal control mechanism (constitutional court's and the "ordinary" judicial process) over several parliamentary decisions[4] and the two-third parliamentary majority of the government indicate that oppositional MPs look for an alternative legal control forum and they found it in

[4] The lack of legal control mechanism over parliamentary operation is an old debt of the Hungarian parliamentary law. In his 2008 book, Péter Smuk emphasizes that the Hungarian law does not take any sanction because of the violation of the Standing Orders and he depicts this phenomenon as a general problem. SMUK, PÉTER: *Ellenzéki jogok a parlamenti jogban* [Oppositional Rights in the Parliamentary Law], 2008, Gondolat, Budapest, 138. *See* also Lajos Csörgits's recension on this book: CSÖRGITS, LAJOS: *Smuk Péter: Ellenzéki jogok a parlamenti jogban* [Smuk Péter: Oppositional Rights in the Parliamentary Law], in *Jog-Állam-Politika*, Vol. 3. No. 1. (2011) 138.

the Strasbourg European Court of Human Rights (hereinafter: ECtHR or Court). This paper tries to show three applications concerning parliamentary cases received before the ECtHR. The Court still does not decide on the applications but it found them admissible. For this reason this paper also tries to deduce the expected decision of the Court via its former case-law.

Constitutional law – and within the parliamentary law – was used to be mentioned as the most national branches or fields of law. Because of this, the effect of an international forum – the Strasbourg Court – is really important for the Parliament's autonomy.

2. SUMMARY OF THE APPLICATIONS

2.1. Szanyi v. Hungary

At a plenary session on 18 March 2013 an oppositional MP Tibor Szanyi – a member of the Magyar Szocialista Párt (Hungarian Socialist Party) – showed his middle figure, in the course of his speech, to the members of the right-wing party called Jobbik. Ten days later he was fined HUF 131.140 for using a blatantly offensive expression. The same MP submitted an interpellation request addressed to the Minister of National Development which was denied by the speaker on 6 May 2013. The applicant submitted a further interpellation request on the same topic, which was again dismissed by the Speaker on 27 May 2013. The reason of the speaker's decisions was that the interpellations hurt the prestige of the Parliament because of their content.[5]

The legal ground of the decisions was the general commitment of the Commission for Constitutional, Justice and Procedural Affairs No. 22/2010-2014. (1 October 2012) AIÜB. It declares: "for the President, practicing the right ensured in Article 97, paragraph 4 of the Standing Orders – on denying proposals – is established with that

[5] Application no. 35493/13. Avalible at: HUDOC database of the ECtHR: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%235493%22],%22itemid%22:[%22001-138867%22]} [cit. 2014-03-27].

if the proposal is inappropriate for negotiation and decision-making. Negotiating proposals of obviously frivolous and offensive content is incompatible with the Parliament's reputation. Denying such proposals is the right and obligation of the Speaker, based on Parliamentary act Article 2. (1)." According to the above mentioned part of the Standing Orders: "the speaker shall deny proposals of inadequate form." Hence, it is significant to note that the committee's resolution extended the speaker's sphere of competence for the content investigation of proposals.

2.2. Karácsony and Others v. Hungary

At a plenary session on 30 April 2013, during a voting process, the Gergely Karácsony and Péter Szilágyi – two MPs, members of the oppositional party called "Lehet Más a Politika" (hereinafter: LMP) – showed a billboard in the session hall displaying the text "You steal, you cheat, you lie." On 13 May 2013 the Parliament fined Mr. Karácsony HUF 50.000 and Mr. Szilágyi approximately HUF 185.000 for seriously disrupting the proceedings of Parliament.

On 21 May 2013 during a plenary voting, two other MPs of LMP – Dávid Dorosz and Rebeka Katalin Szabó – presented a billboard with the text "Here operates the National Tobacco Mafia". On 27 May 2013 they were fined HUF 70.000 each for seriously disrupting the plenary proceedings.[6]

2.3. Szél and Others v. Hungary[7]

The final voting of the bill on the turnover of agricultural lands and forestry holdings which provoked great political turbulence was held on 21st June 2013. During the course of the voting, a few oppositional MPs who are members of the LMP – Bernadett Szél,

[6] Application no. 42461/13. Available at: HUDOC database of the ECtHR: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%242242461%22],%22itemid%22:[%22001-138866%22]} [cit. 2014-03-27].

[7] Application no. 44357/13. Available at: HUDOC database of the ECtHR: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22sz%C3%A9l%22],%22itemid%22:[%22001-138868%22]} [cit. 2014-03-27].

Ágnes Osztolykán and Szilvia Lengyel – used a megaphone and expanded posters, furthermore, brought soil in front of the president in a small golden wheelbarrow.[8] Due to this, the speaker suggested to decrease those three representatives' honorarium by one-third (HUF 130.000-155.000), which suggestion was accepted by the Parliament.[9]

2.4. Legal aspects of the complaints

Hungarian legislature does not provide any kind of legal remedy neither with the speaker's decision of denying interpellation, nor against disciplinary sanctions. Hence, representatives turned to ECtHR in all three cases and named Articles 10 and 13 of ECHR as the basis of their complaints. The first one protects the freedom of expression, the latter one protects right for an effective legal remedy.

Furthermore applications cite Article 14, because they state that measures targeted them as oppositional MPs, constituting discrimination on the ground of political affiliation, in breach of Article 14 read in conjunction with Article 10.

3. EXPECTED DECISION OF THE STRASBOURG COURT

3.1. Freedom of expression

Second point of Article 10 contains the reasons for restriction of the freedom of expression: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of na-

[8] Available at: Parliamentary Journal: http://www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat_aktus?p_ckl=39&p_uln=292&p_felsz=63&p_felszig=65&p_aktus=30 [cit. 2014-03-27].

[9] Proposal No. H/11658. *See* website of the Parliament: http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=11658 [cit. 2014-03-27] and the Parliamentary Journal: http://www. parlament.hu/internet/plsql/ogy_naplo.naplo_fadat_aktus?p_ckl=39&p_uln=293&p_felsz=78&p_felszig=80&p_aktus=24 [cit. 2014-03-27].

tional security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The Court examines other questions concerning the admissibility of the restriction. The restriction shall meet all of the following requirements:

1. the restriction shall be based on an act;
2. the intervention shall tend to an aim listed above and;
3. it must be necessary in a democratic society. It has no general interpretation, the Court shall decide regarding all circumstances of the given case. But the Court always demands that the intervention shall
    a) serve a factual and powerful public interest and
    b) be proportional.[10]

The disciplinary sanctions adhere to the strict test's point a) that is, to the regulation equal to acts, as their formation is based on Parliamentary Acts. At the same time, the speaker denying interpellation only rests on a committee resolution lacking obligatory power. This scarcely corresponds to ECTHR's notion of law – which is used in wide interpretation – : "…in practice, every public act is regarded as law".[11]

As regards point b), we can state that with contrast to courts, the maintenance of parliamentary bodies' prestige is not present in the indications of limitation. The efficiency of referring to the "protection of others' rights" can be questioned as well, as appointing such rights of other people which would have been wounded by using posters is complicated, especially if we take permissive rules of judging politically exposed persons into consideration.

The requirement of cogent public good written in point c) is realized, as parliamentary work free of disruption – and efficient – is by no means can be regarded as such. However, it is worth taking it

[10] *See* GRÁD, ANDRÁS – WELLER, MÓNIKA: *A strasbourgi emberi jogi bíráskodás kézikönyve* [Handbook of the Jurisdiction of the Strasbourg Court of Human Rights], 2011, HVG-Orac, Budapest, 449, 546.
[11] Ibid. 449.

into consideration that representative's freedom of communication is generally strictly protected by ECTHR: "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court."[12] The case – in which declaration was born – was proposed to ECTHR by a Spanish ex-representative, as he was condemned because in an article he was saying strict charges of terrorism regarding the Spanish government, upon which the Senate terminated his parliamentary immunity, and the court sentenced him for contravening the government.[13] Hence, it is visible that the case of LMP representatives and the Costello vs. Spain case – in which ECTHR declared Spain's violation of agreement – varies in many cases such as representative behaviour and the type of the applied legal consequence, however, its general statements are of orientation nature.

3.2. Right to an effective remedy

According to Article 13 of ECHR, the right to an effective remedy means: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."* Generally, all such legal relations give basis to the applicability of Article 13 of ECHR, in which ECHR's violation comes up but for its remedy, the national law does not provide a forum.

[12] *Castells v. Spain* judgement of 23 April 1992, Series A no. 236-B section 42.

[13] For a detailed summary of Castells v. Spain see: VÁCZI, PÉTER: Képviselői szólásszabadság és mentelmi jog [MP's Freedom of Expression and immunity], in SZENTE, ZOLTÁN (ed.): *Applicatio est vita regulae. Nemzetközi jogesetek a parlamenti jog köréből* [International Cases from the Field of Parliamentary Law], 2013, Universitas, Győr, 121-126.

The likelihood of the grievance of ECHR's other articles itself gives basis to Article 13' call: "actual grievance of another article is not a precondition of a successful citation of Article 13, instead, if this citation from another article is substantive, is connected to question under the effect of the Agreement and is not clearly incompatible with the Agreement, and not clearly causeless, suffices."[14]

If EHCR really declares right for legal remedy as a compulsory requirement, it also means the relevant decrease of parliamentary autonomy. However, it is a question that how right for efficient legal remedy appears in EHCR's case law and whether we could regard parliamentary decisions as exceptions.

The practice of ECtHR does not leave any doubt about that Hungarian law violates Article 13 of EHCR with that it does not ensure opportunity for legal remedy against parliamentary actions causing the violation of EHCR: "If a person does not have the possibility for any kind of legal remedy in connection with a substantive case from the point of view of the Agreement, this undoubtedly goes together with the violation of Article 13 (compare with for instance Halford v. the United Kingdom judgement of 25 June 1997, Reports 1997-III., p. 1004, and Wood v. the United Kingdom judgement of 16 November 2004, no. 23414/02). The practice would be the same as well, if the unappealable supremacy decision originates from a sovereign prince, himself (compare with Wille v. Liechtenstein judgement of 28 October 1999, no. 29396/95)."[15]

The Wille v. Liechtenstein case is especially important for us, as political discretion appears in it, which is on the one hand, characteristic of a parliamentary session, on the other hand, the parliament's provisional right for its members. Let us briefly investigate the Wille case's facts and the Court's decisions.

The applicant, Dr. Herbert Wille, was the member (deputy head) of the Liechtenstein government in the beginning of the 1990's. In 1992, a controversy arose between His Serene Highness Prince

[14] GRÁD – WELLER: *op. cit.* 621.
[15] Ibid. 624.

Hans-Adam II of Liechtenstein ("the Prince") and the Liechtenstein government on political competences in connection with the plebiscite on the question of Liechtenstein's accession to the European Economic Area. The applicant had not stood for re-election in May 1993, and he was appointed President of the Liechtenstein Administrative Court. On 16 February 1995, in the context of a series of lectures on questions of constitutional jurisdiction and fundamental rights, the applicant gave a public lecture at the Liechtenstein-Institut, a research institute, on the "Nature and Functions of the Liechtenstein Constitutional Court". During the course of the lecture, the applicant expressed the view that the Constitutional Court was competent to decide on the "interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet". On the next day, a newspaper published an article on the lecture given by the applicant, mentioning his views on the competences of the Constitutional Court.

The Prince sent a letter to Mr. Wille and expressed his disapprobation because of Mr. Wille's views on the role of the Constitutional Court: "Unfortunately, I following the publication of the report in the Liechtensteiner Volksblatt had to realise that you still did not consider yourself bound by the Constitution and held views that were clearly in violation of both the spirit and the letter thereof. […]. In my eyes, your attitude, Dr Wille, makes you unsuitable for public office. I do not intend to get involved in a long public or private debate with you, but I should like to inform you in good time that I shall not appoint you again to a public office should you be proposed by the Diet or any other body."[16] After the letter, there were several bouts between the Prince and Mr. Wille but their relationship became really harsh when Mr. Wille's term of office as a judge expired. On 14 April 1997, the Liechtenstein Diet decided to propose the applicant again as President of the Administrative Court. In a letter of 17 April 1997 to the President of the Diet, the Prince refused to accept the proposed appointment. He explained that, considering his experiences with Mr Wille, he had become convinced that Mr Wille did not feel bound by the Liechtenstein

[16] Quotation from the Prince's letter.

Constitution. In these circumstances, he would be failing in his duties as head of State if he were to appoint Mr Wille as President of the Administrative Court. After the Prince's decision, Mr. Wille appealed to the ECtHR.[17]

The Court stated that the Prince violated Mr. Wille's right to free expression declared by Article 10 of ECHR. After the declaration of the violation of Article 10, the Court dealt with the right to effective remedy declared in Article 13. The ECtHR examined the Liechtenstein statute law – especially the Constitution – and case law of the Constitutional Court and appointed that there was no effective national remedy against the decision of the Prince.[18]

The ECtHR knew the discretional character of the Prince's decision and the nature of the Prince's legal status but the Court did not let to fault the defence of the ECHR. What is more the Court examined rules of the constitution, which are situated on the highest level of the national legal system.

Hence, the Wille-case – mutatis mutandis – should be instructive for the Hungarian Parliament's autonomy because it shows that exercising discretional competences does not mean an exception of the right to the effective remedy.

3.3. Prohibition of discrimination

Maybe it is the hardest challenge to forecast the Court's decision on the breach of Article 14. The Parliament's operation is based on the contradiction of the governmental and oppositional factions. Since parliaments are political entities this type of contradiction must be political, too. In such an environment the discrimination on political belief is unavoidable. On the other hand there is the legal demand of the president's and speaker's impartiality: the speaker shall rule the plenary sessions impartially and president shall exercise its competences impartially, too.[19] It means that they shall apply the same way the rules on interpellation and discipline law to the governmental and oppositional MPs. Aside from the rejection of the

[17] The case's facts were based on articles 6-22 of the Court's judgement.
[18] Paragraphs 71-78 of the Court's judgement.
[19] Parliament Act Art. 2. para. (2) point f) and Art. 3. para. (1).

interpellation – which is the sole competence of the President – disciplinary measures (imposing fines) are applied by the plenary session, the President shall only suggest the application of a measure. Due to the principle of free mandate, there shall be no legal demand for the vote of an MP, what is more, an MP can be partial – therefore nobody can enforce an "impartial" "non-discriminative" decision from the plenary session.

In the second section of the ECtHR's process the Court asked in all three cases whether "only opposition members were subjected to disciplinary measures and restrictions due to the content of their statements?" It shows that the Court will back away from its former decision, because in Sunday Times v. the United Kingdom (No. 1.) the Court declared that the fact, that no sanction was taken against another subject – which is in a similar situation – is not sufficient evidence of constituting of discrimination.[20] This case is really important for us, because this declaration was made concerning discrimination on the ground of political affiliation, in breach of Article 14 read in conjunction with Article 10.

The question of the Court creates a difficult situation for the Government because no governmental MP was subjected to disciplinary measures. Does it mean at once that the Parliament's practice of disciplinary law is discriminative? As if the Court does not pay attention to the chance that governmental MPs did not commit any disciplinary fault.

It is worthy to note that the reception of the complaints show that the prohibition of discrimination is a general demand which shall be applied in the field of parliamentary law – despite of the principle of free mandate.

[20] "The fact that no steps were taken against other newspapers, for example the Daily Mail, is not sufficient evidence that the injunction granted against Times Newspapers Ltd. constituted discrimination contrary to Article 14 (Art. 14)." *Sunday Times v. the United Kingdom* (No. 1.) Paragraph 71. Avaliable at: HUDOC Database of the ECtHR: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22sunday%20times%20v%20United%20Kingdom%22],%22itemid%22:[%22001-57584 %22]} [cit. 2014-03-27]. *See* also: GRÁD – WELLER: *op. cit.* 677.

4. SUMMARY

The role of international law in constitutional law is really questionable, and in the field of parliamentary law is much more doubtful, because parliaments are both political and legal entities and therefore their operation is special. Despite of these the Court seems to apply the "general" requirements to the parliamentary operation, leastways Castells v. Spain and Wille v. Liechtenstein cases point to this direction. Furthermore the question that the Court asked in the Hungarian cases also shows that the Court is disposed to put across the demand of the prohibition of discrimination, too.

Summing up all the facts and conclusions listed above, it seems that the ECtHR may become the strongest restrictor of the Hungarian Parliament – and therefore each national parliament of the member states of ECHR – several complaints concerning parliamentary law were admitted by ECtHR and it shows the importance of the international law's effect on the national parliaments' autonomy. I think that the three complaints from Hungary will also strengthen the influence of the Court to the operation of the national parliaments.

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[2] GRÁD, ANDRÁS – WELLER, MÓNIKA: *A strasbourgi emberi jogi bíráskodás kézikönyve* [Handbook of the Jurisdiction of the Strasbourg Court of Human Rights], 2011, HVG-Orac, Budapest.

[3] SMUK, PÉTER: *Ellenzéki jogok a parlamenti jogban* [Oppositional Rights in the Parliamentary Law], 2008, Gondolat, Budapest.

[4] VÁCZI, PÉTER: Képviselői szólásszabadság és mentelmi jog [MP's Freedom of Expression and immunity], in SZENTE ZOLTÁN (ed.): *Applicatio est vita regulae. Nemzetközi jogesetek a parlamenti jog köréből.* [International Cases from the Field of Parliamentary Law], 2013, Universitas, Győr.

Ádám FARKAS[1]

State and its Defence as Historical Constellation – Thoughts on the Historical Improvement of Modern States' Armed Defence with Regards to Carl Schmitt's Tropes of Total State and Total War

1. INTRODUCTION

The – more and more intervening – state of nowadays is in a strong constraint of institutionalization, especially in the field of defence. During the last one and a half – two decades states' defence has undergone significant changes and especially intense differentiation. Of course, one cannot forget that utilizing the above mentioned ones, threat and danger-types have significantly changed compared to earlier times. All these have to be treated in a way that solutions have to correspond to the condition system of the rule of law, and modern states and societies with their defence reaction shall not violate those principles and criteria which protection they shall perform.

This institutionalization constraint concerns every state. It concerns those who previously had sophisticated, or at least well-structured defence system, and those who previously did not really

[1] The study exclusively presents the writer's point of view; those cannot be regarded as standpoints of the institution where the writer is employed.
The writer's research was conducted among the frames of the National Program of Excellence – a convergence program, an important project for developing and operating a system that ensures personal support for national students and researchers; identification nr. TÁMOP-4.2.4.A/2-11/1-2012-0001. The project is being realized with the support of the European Union, with the European Social Fund's co-financing.

have differentiated defence system. In the case of Hungary, the differentiation of the state's armed defence became stronger at the end of the 19th century, and together with shorter or longer periods of silence, it went on until the end of the 20th century,[2] and was strengthened by a newer transformational, re-imaginational tendency[3] during the last few years.

However, these changes happened and have been happening in such a way that first at the turn of the 19-20th century, then at the turn of the 20-21st century it could again be said that states' defence and their intervening nature caused serious counter-feelings with regards to principles and budget, too. On the one hand, their bases are given by the extremes of the 20th century; on the other hand, people – and legal science – only deal with the importance of defence when it is already too late. Armed defence institutions become important when not preparation and prevention, but reaction is needed because the attack against the state and society has already happened.

This tendency was strengthened by the endeavours of the market-centred neoliberal age which intended to lay off the state and – besides great powers – its interfering ability. We can say that this neoliberal ethos has already failed by now, and unfortunately besides

[2] Were formed in this period: (1) Besides the Austro-Hungarian Monarchy's common army, the Imperial and Royal army as military and police force; (2) gendarmerie, as half-military protection of law and order. Individual (3) (state) police, (4) custom service, (5) border police then border service and (6) various exploratory and preventive bodies started to develop these times. Besides, existing institutions also started to reorganize or differentiate, especially in the 20th century. Such were (7) guards, (8) directly elected chamber guards, and (9) slowly organizing political polices, then institutionalized secret services.

[3] Besides renaming and restructuring various secret services, the Counter Terrorism Centre, and the independent National Protective Service of the Police was formed in the previous years in order to accomplish anti-corruption tasks. Besides these, regarding historical traditions as priority, Guard of the National Assembly of Hungary was set up to protect legislation.

economic events its failure was accompanied by such attacks as the terror attacks and cyber-crimes at the beginning of the 21st century.

In spite of these, I still believe that the re-imagination of defence and intervention has only started in an ambivalent way and the fact that the historical and theoretical analysis of defence shows insufficiencies plays a significant part in it. Hence, in this study I intend to review the improvement of states' armed defence from historical and theoretical point of view, referring to Carl Schmitt's topes on total state and total war. I trust that the analysis of historical improvement can shed light on new ideas and findings, and these will be able to support the actual reform and strengthening of states' defence apparatus.

2. STATE MODELS AND HISTORICAL DYNAMICS

Our historical experiences show that significant historical changes and turning points rewrote our picture and concepts of state from time to time. This change is followed by political and legal sciences via working out state models.

The focal point of model change is the change in power. Change in the method of practising the power and among those who possess power, gradually alters the structure of politics and state, and together with this legal regulation, which has significant structural and functional impacts on states' defence system, too.

Studying this is significant from multiple points of view. On the one hand, power shifts are of cyclic nature and did not cease together with the end of the cold war, which is well presented by the liberal power change which caught privatisation revolution to life and its failure.[4] On the other hand, adequate historical interpretation is by all

[4] This also defines our present for instance via making it possible to outsource certain national functions of violence to the private sector. I believe that this is such a change in a state's armed defence which partly

means necessary to properly interpret, and for the future, to rethink these processes and the main problems of the question of armed defence in general. However, as a starting point we also have to rethink the relation between state and violence, and the historical improvement of national violence.

Defining the concept of state is an especially diverse and polemic question. Still, I personally believe that the concept of the state has such an element, which stands beyond all disputes. This is being the legalized and institutionalized violence. This was the most plastically portrayed by Max Weber as the monopoly of legitimate physical violence. However, it can be seen that political-military fight and together with it violence is a historically immanent part of the state,[5] hence, the state is unimaginable without violence and processes of threat via constraint. It would be ideal and necessary that states' basis was not violence, but everyday reality requires this base, which has been justified by philosophical views on humans and human society from ancient times until present day.

Hence, from institutional and anthropological point of view, violence is a basic conceptual element of states. The state maintains society's order with its threatening authorities that apply violence, hence, with justified and legal violence. We could also say that states use qualified violence in order to fight against illegal violence attacking their society. Hence, states' situation is paradox: violence is at the same time, reason and consequence of their existence, of course, not in identical quality, nature and extent.

On the basis of this, we can justify the following statement: armed bodies are the national existence's most basic self-maintained

sacrificed legal improvement's certain innovations on the altar of unsure budget advantages and political aims.

[5] This is partly justified Braudel's thought: It is indeed a wonderful history which is strongly connected to people's work, and to the really slow advancement achieved in connection with outer atmosphere and fight against themselves. *See* BRAUDEL, FERNAND: *A kapitalizmus dinamikája* [The Dynamics of Capitalism], 2008, Európa Könyvkiadó, Budapest.

and defence institutions; with which states are able to stop unlimited and arbitrary violence, let it be external or internal nature.

Qualified national violence practised by those armed institutions that became fundamental via this way changes through the course of history, especially regarding states' power analysis. In inglorious historical times states' bodies of violence overstep their original tasks and become arbitrary. Its reason is that national bodies of violence are closely related to the respective power constellation and in many historical changes they transmit the replaced old system's practice simply with altered indication, to the command of the new order.[6] It also comes from this that the state, more exactly the state model's change always goes hand in hand with the changes of national violence apparatus and qualified violence. We could also say that without the change of national bodies of violence and qualified violence historical change of an era cannot be imaginable.

This statement is supported by the fact that modern states and war also became total. States' armed bodies first were nothing else but armies used to maintain inner order, mainly carrying out offensive violence. With time, institutional dimension of national violence differentiated, and besides armies purely protective bodies were formed. However, emphasis was for a long time laid on offensive characteristics. The great change was brought about in the 19-20th century, when nations' offensive nature turned towards defensive behaviour, then, by the end of the 20th century defence became the primary function. For the great change, two significant elements were needed in the context of historical improvement,

[6] Quoting Francois Furet – Quinet's thoughts – referring to the French revolution he emphasizes that violence has accompanied transformation all the way through and it is only by whom and how violence is used that changes …revolution in the phase of terror, uses absolutism's authoritarian practice with the well-tries excuse, which also made good service at times of absolute monarchy. Heirs automatically step in the place of ancestors: in the person of Robespierre Richelieu reborn. *See* FURET, FRANCOIS: *A forradalomról* [About the Revolution], 2006, Európa Kiadó, Budapest.

which Schmitt's political theory described with the formula of states' becoming total and the tot war. Their combined effect was what rewrote states' armed defence, and upon which we ought to ask the following question: is defence total?

3. ARMED DEFENCE AS HISTORICAL CONSTELLATION

Armed defence bodies of a state and their ability can be regarded as a sensitive question in politics and political and legal sciences, as numerous historical examples are known regarding powerful national armed bodies' degradation. However, we must not forget: defence apparatus – in many cases – became dangerous when politics and via it national decision-making and operation failed, as well.

With regards to states' armed defence system, the oldest institution is undoubtedly the army, which most stronger and stabile form was a well-trained, optimal number 'professional' force even in the early centuries of history.[7] This variant's early, most improved version was given by the Roman army who followed the Mariam reforms. This model was formed with the crisis of the republic, when those processes already became visible which led to the total transformation of states. The reform of the army originated from the intensification of social problems and the erosion of the political system's processes that strengthened each other, which, with the growing need for expansion, lead the Roman state to civil war, then to the monopoly of power and imperial existence.

At this point, with regards to 'professional' Roman legions, political philosophies' significance must be emphasized. One example is Plato's theory described in his work, entitled *State*. In this work condition of stability, professional nature and adequate number

[7] Peter Harclerode regards the Assyrian army dated back to 1250 BC., then following those Greek continental groups as one of the first ones. *See* HARCLERODE, PETER: *A háború eszközei* [The Instruments of War], 2002, Magyar Könyvklub, Budapest, 9-10.

can be found.[8] I believe that Plato's thoughts, as soon as with Grecian mediation were partly realized in the Roman army, vivified history's most well-known and most significant army, giving new meaning to imperial conception and to the age of empires.

Together with the fall of the Roman Empire this knowledge became overshadowed[9] for a long time. Avoiding the expression of the "*Dark Ages*" it can surely be said that well-organized, permanent, regular forces were overshadowed for a while. The time of military democracies[10] was followed by the age of warrior nobles[11] known as

[8] The concept of permanent defence forces can be shown in his views regarding guards and the exact expectations referring to them. Regarding "professional" nature, he writes that everyone shall have one profession, then thinks it further under title "Defence of states' area: professional armies". Here, he emphasizes that guards have soldiering as their profession, their only profession. We can find assistance on these forces' adequate size under title "What size should a state be?" and under title "war". In these commentaries he says that a state's size is determined by its ability to maintain unity: it can only be that size with which it is still unite. Nevertheless, the state – taking all possibilities into consideration – must possess a ready-to-fight, permanent army, which pre-condition besides adequate preparation are: worked-out training, education and organization. PLATON: *Az állam* [The State], 2008, Cartaphilus Kiadó, Budapest, 65-78., 92-93., 103-107., 132-141., 201-209., 249-254.

[9] For Europe, the most well-known and feared exception from this tendency was the Turkish Empire's army with janissaries.

[10] On the institution of military democracy Morgan H. Lewis's views can be regarded as decisive, which is also regarded as significant according to domestic history of law. Its essential is that – not only regarding nomad peoples – it is based on the majority principle of actual power, most of which consists of armed, soldiering men who ensure their people's existence through various great military ventures. *See* LEWIS, MORGAN H.: *Ancient society*, 1877, Charles H. Kerr & Company, Chicago.

[11] As this is also explained in connection with Hungary in Werbőczy's Tripartitium in thoughts on nobility's origin. *See Werbőczy István hármaskönyve* [Tripartitum], 2006, Farkas Lőrincz Imre Kiadó, Budapest, 73-74.

the nation's offspring, then noble armies,[12] but mostly the periodically employed mercenaries' age. Then the institution of mercenaries – together with the cerebral rediscovering of Renaissance – extorted the re-imagination of the state and its defence system.

Niccolo Machiavelli can be regarded as a significant thinker in this period, who, besides modern political philosophy, wrote numerous significant writings in connection with protection of states – in a perhaps derogatory forgotten way. Machiavelli wrote disapprovingly about mercenaries[13] in his work, entitled *The Prince*, and emphasized that *"no principality is secure without having its own forces; it is entirely dependent on good fortune, not having the valour which in adversity would defend it."*[14] Additionally, a unique and again

[12] If we also look at the political transformations that stand behind the change of army-model, change is clearly understandable. After the fall of the Roman Empire Europe became wandering people's road and battlefield, in which state-social system armed men as political nation form the army. After settling down, this model cannot be held onto with the lack of movement and threat, and because of the urge to produce. Together with the material and political differentiation of society armed nobility became the base of armies, which status interest was to maintain its influence that is status quo through soldiering. And when the improvement of production and technology, and population increase made it necessary and reasonable, direct nobility soldiering was replaced by armies. Mercenaries made them stop because of two reasons. On the one hand, the strengthening of the ruler's power opened way to professional mercenaries against nobility armies that undermined power, on the other hand, noble's power endeavors raised the significance of rentable army-knowledge.

[13] "*Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as attack is; for in peace one is robbed by them, and in war by the enemy.*" *See* MACHIAVELLI, NICCOLO: *A fejedelem* [The Prince], 2006, Cartaphilus Kiadó, Budapest, 61.

[14] MACHIAVELLI: *op. cit.* (2006) 71.

misunderstood thinker in his work written to Lorenzo de' Medici carefully described that he can only regard am army recruited from his own people, citizens, subject as his strength, and everything else is just army of mercenaries or assistant army,[15] which significant application shall be avoided. In his work written on the art of war he overstepped the analysis of defence force on the part of building power. He wrote down basic – superior to his age – views on the importance and regulation of armies,[16] and also on their employment in wars. Of course, these were not fully realized for centuries; still, they signalled the innovation that replaced mercenaries.

The turning point started in the 17-18th century, when the Europe of absolute monarchies started to replace mercenaries with permanent armies. Maybe in this context as well we can say that the year of 1648, the Peace of Westphalia is a key element – though, not without antecedents.[17] Besides the age of nation states, it opened the

[15] Ibid. 71.

[16] Its example can be found in the introductory thoughts written in his work, entitled *The Art of War* as he writes down his specific, even today advisable and suitable for reception thoughts on the relation between civil and military life, and on the importance of rules. As he says: "But if they should consider the ancient institutions, they would not find matter more united, more in conformity, and which, of necessity, should be like to each other as much as these (civilian and military); for in all the arts that are established in a society for the sake of the common good of men, all those institutions created to (make people) live in fear of the laws and of God would be in vain, if their defense had not been provided for and which, if well arranged, will maintain not only these, but also those that are not well established. And so (on the contrary), good institutions without the help of the military are not much differently disordered than the habitation of a superb and regal palace, which, even though adorned with jewels and gold, if it is not roofed over will not have anything to protect it from the rain." MACHIAVELLI, NICCOLO: *A háború művészete* [The Art of War], 2001, Szukits Kiadó, Szeged, 6.

[17] For instance in Hungarian relation – just like in various European states – transformation of armies had already been considered at the end of the 16th

first era of the new organization of armies finishing with the Great French Revolution. *"In order to protect political power it became necessary and was sufficient to have an army which was kept armed even at times of peace, which was greater in number, much more armed and supplied, providing primary support for the central power. Hence, its presence characterized European defence in the given one and a half centuries."*[18]

That time, Great European nations started to reorganize their armies following the model of French absolutism. *"Regarding Habsburg rulers' politics, the end of the XVII. and the beginning of the XVIII. century meant the transition from an army used according to momentarily needs to an army formed according to coherent basis."*[19] However, it did not happen otherwise among great powers and empires defining that certain age, either. For instance, Prussia, Europe's soldier state put on its "new clothes" at that time,[20] as defence revolution appeared in Sweden and slowly in Russia, too.

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century. "*The country's desperate state made legislative bodies finally think and act. And really, parliaments' activities between the ages of 1593-1604 did left results and traces. The thought of national permanent army was formed then, and after a century a new army was formed from the seed."* BORS, JÁNOS: Az állandó hadsereg kérdése Magyarországon 1593-tól 1715-ig [The Questions of a Regular Army in Hungary between 1593 and 1715], in *Hadtörténelmi Közlemények*, No. 8. (1895) 98.

[18] ZACHAR, JÓZSEF: *Habsburg-uralom, állandó hadsereg és magyarság 1683-1792* [Habsburg Domination, Regular Army and Hungarians 1683-1792], 2004, Zrínyi Kiadó, Budapest, 9.

[19] SZABÓ, DEZSŐ: Az állandó hadsereg beczikkelyezésének története III. Károly korában [The History of the Regulation of the Regular Army III. In the Age of Charles], in *Hadtörténelmi Közlemények*, No. 11. (1910) 23.

[20] Regiments' >>nationalization<< – as we can call previous mercenary paradises' cease – were done during the time of the first Prussian king…" writes Ottokeinz on the formation of Prussian military state and Prussian defense. ROCHOL, OTTOHEINZ: Az állandó hadsereg mint a feudális reakció támasza [The Regular Army as the Support of the Feudal Reaction], in *Hadtörétnelmi Közlemények*, No. 3-4., (1954) 134.

Together with the formation of permanent armies, their technical and military training brought about a new revolution in the age. Empires' armies underwent other significant changes. Training, discipline, mechanic tactics and making artillery as an art brought such changes that warfare of the 18th century did not remind to the chaos of war, to the age of experimentation in the 16th and 17th centuries.[21] These times gave the opening of an era in which Clausewitz's views on war became fundamental, and which was only parted from the age of total war's era with the lack of extreme emotional badinage.

The 18th century's permanent armies – maybe we can say that after Rome, again – vivified a new social layer and a new profession which were not less or not more than the elements with special status of absolute monarchies' centralized state apparatus. These armies were the nature of empires, mostly mixed nationalities, and their functioning was only the interest of the empire.

After the organizational replacement of mercenaries, then the inner restructuring of forces it was another turning point that the pay-centred old … was replaced with something else. And this new was nothing else but the ideal of national armies. It came the era of national armies, revealing together with the French Revolution then with Napoleon's armies, moving towards general national service. In this, soldiers were taken over not only by pay, discipline and existential opportunities, but also by emotional feelings towards their own nation and by the dedication coming from this.[22]

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[21] KEEGAN, JOHN: *A hadviselés története* [The History of Belligerency], 2004, Corvina Kiadó, Budapest, 338.

[22] The model's base was laid down by Napoleon, when besides permanent and professional army he called French people to war on the principles of volunteering then compulsory military service for the cause of the nation and accomplished "regular army and National Guard's unites' merge into one brigade in two to one proportion in order to increase volunteers' number with professional soldiers. Hence, a completely new army was formed." *See* KEEGAN: *op. cit.* 343. From this type of army a permanent

Afterwards, by the end of the 19th century, nationalism became integrated in Europe's nation states, and even great powers operating as empires – like the English Crown or the Austro-Hungarian Monarchy – within imperial defence became open towards the partly national-principled organisation of armies,[23] and towards the partial acceptation of nations' endeavours to do so. Concerning our topic, to this temporal picture covering the whole of Europe we must add that European states growing nationalism naturally fed militarism, successes of imperialist politics fed nationalism.[24]

Hence, the (nation) state of the beginning of the 20th century, from military point of view rose as the result of a long improvement, and showed something new: national army and defence monopoly based on the civil era's general national service. However, by that time it was not only the warfare that had been transformed but the state itself, too. As nodes of the national defence's improvements that I have previously presented all coincided with the key-points of the nation's improvement and change. Its 20th century culmination is what brought new in quality in the whole of the nation's phenomenon system; those two phenomena which were marked by Carl Schmitt as total state and total war.

4. TOTAL STATE AND TOTAL WAR ON THE PAGES OF HISTORY

Hence, total state is implicitly the result of historical improvement. This model is the state which was formed by the end of the 19th and

national armies' need and age and the nation and war's total transformation was only one step away – an episode rich in revolutions and neoabsolutist endeavors.

[23] Besides mutual army, Hungarian Royal Army and Landwehr's formation exemplified this in the Monarchy, while in the case of the British Monarchy it is worth commemorating on the organization of national and colonial formations.

[24] KEEGAN: *op. cit.* 349.

the beginning of the 20th century, which has its roots in centralizing and professionalizing absolutist state, and also which replaced previous census, classifying liberal schemes that restricted social subsystems. In this new model "*The equation state = politics becomes erroneous and deceptive at exactly the moment when state and society penetrate each other. What had been up to that point affairs of state became thereby social matters, and, vice versa, what had been purely social matters become affairs of state-as must necessarily occur in a democratically organized unit."*[25]

Hence, total states' base is the democratizing modern nation state, which has to live together with the empires and the empirical thought, and which is at the same time also a living opposition to empires. I personally believe that this democratizing nation state model was a necessary consequence of all those historical improvements which undermined empires on the level of society. However, we also have to see that this kind of state's totality lies in that *"A definition of the political can be obtained only by discovering and defining the specifically political categories. In contrast to the various relatively independent endeavours of human thought and The Concept of the Political action, particularly the moral, aesthetic, and economic, the political has its own criteria which express themselves in a characteristic way. The political must therefore rest on its own ultimate distinctions, to which all action with a specifically political meaning can be traced."*[26]

Hence, the state with its own power and model change – as action – necessarily went through the same path as protection and defence – as reaction. Their modern improvement really started with the centralization of absolutism, then gained real followings with nationalization and decentralization, and finally, by the beginning of the 20th century a new, comprehensive, so to say covering everything, hence, total model was realized.

[25] SCHMITT, CARL: *A politikai fogalma* [The Concept of the Political], 2002, Osiris – Pallas Studio – Attraktor, Budapest, 16.
[26] Ibid. 16.

In total states – where a completely new, trained, permanent, loyal, professional armed violence apparatus is given – nearly all questions are of political nature with which national intervention's area is also significantly widened. Schmitt also highlights that it is the state's competency – in order to protect itself – to determine who is considered as friend and enemy, and how to proceed with the latter one. However, this competency's realization requires inevitable increase in one's defence system when most questions become of political nature, and dangerous behaviours belonging to the enemy can appear in most social subsystem. This can lead to the functional and structural differentiation of the armed violence's apparatus, as different proceedings shall be applied with inner and outer enemies, hence, differently trained and equipped bodies are necessary.

As Schmitt says: *"The endeavour of a normal state consists above all in assuring total peace within the state and its territory. To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid."*[27] However, a total state has to create such a structure for this which is suitable for fulfilling all these requirements. This also goes together not only with the above mentioned differentiation but also with the re-imagination of tools, which already became enabled to outgrow the total state itself with decisions made in the political zone. In this view, we must mention internment which started as protectional isolation, parallel partisan methods of fighting and war that became total.

Armed activities' omnipresent nature and asymmetric warfare's new age as direct preview of the total war appeared at the end of the 19th century, together with total – English, Spanish, German, French, etc. – states. In this age warfare happened between those countries whose armies could not be compared to each other. Its classic example was the colonial wars, described in Schmitt's classify-

[27] SCHMITT: *op. cit.* (2002) 31.

cation.[28] Here, irregular partisans staying away from classic war scenes, supported by civil citizens fought against colonial armies in order to obstruct and democratize colonial armies.

However, the support of civil citizens necessarily expands war to civil citizens themselves, which, in the early times was realized in "safety" measures and called the institution of internal camps to life.[29] Hence, with this, war leaves behind its former classic nature and expands to the previously militarily directly not involved atmosphere, the civil citizens, which means nothing else than the first step towards total war.[30]

However, at this point I must highlight the fact that they strengthened unknown – and by nowadays diverse and strengthened – forms in the asymmetric warfare of nations and armies, one of which is partisan[31] warfare. This is nothing else but counter-effect on the warfare expanded to civil citizens.

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[28] In Schmitt's work written on partisan theory he differentiated classic European – as today we would say symmetric – interstate war; civil war; and colonial war. *See* SCHMITT: *op. cit.* (2002) 109-110.

[29] Regarding these, referring to Joël Kotek and Pierre Rigoulot's work we have to note that internal camps were formed well after real totalitarian war and totalitarianisms, and even well after these – today – they exist. *See* KOTEK, JOEL – RIGOULOT, PIERRE: *A táborok évszázada. Fogva tartás, koncentrálás, megsemmisítés a radikális bűn száz éve* [The Century of the Camps], 2005, Nagyvilág Kiadó, Budapest.

[30] Of course, we cannot negate that it had already been occurred that civil society suffered wars in the form of looting and other insults, however, the tendency appearing together with the end of the 19th century - what are realized as internal camps the most plastically – strongly differ from these phenomena, as on the one hand it means systematic interfere, on the other, hand armies realize these as part of military strategy.

[31] Carl Schmitt fully discusses this question in this work entitled *Theory of Partisan*, in which he historically introduces then compares theoretical approach of war positions this to phenomenon, presenting its notional origin and theoretical improvement.

One of the most well-known manifestations of partisan warfare in history was the Spanish resistance against Napoleon's armies. Schmitt as well starts his investigation from here, which is especially understandable if we take those notes into consideration according to which less than fifty thousand guerrillas could tie down more than twenty-five thousand regular soldiers on that area.

What characterized this form? Most simply it was being outside of the law as classic international law did not recognize partisans as warfare parties, hence, in their relations institutions restricting modern wars did not prevail. It therefore follows what Schmitt correctly noted: *"The modern partisan expects neither justice nor mercy from his enemy. He has turned away from the conventional enmity of the contained war and given himself up to another – the real – enmity that rises through terror and counter-terror, up to annihilation."*[32]

Together with the existence and especially with the spread of partisans two things must be noted. On the one hand, to the fact that they stood outside of the law and to that the actual feud heightening until annulment as Schmitt clearly described resulted in total resistance which did not know limits and conventions, only efficiency and reaching the wished result. On the other hand, we also have to pay attention to that in historical examples nations could not efficiency act against partisans, which gave area to that view which referring to Napoleon's command to Lefévre general in September 1813 states that: *"you have to fight like a partisan wherever there are partisans"*.[33]

This latter one, as a base of reference, with no doubt means that against partisans wars leave their previous processes, that is, with the gradual totalization of wars nations' system of tools was widened in a way that with this a nation's armed character was necessarily strengthened as specially trained forces were needed in this armies, in defence and in political advert, as well.

[32] SCHMITT: *op. cit.* (2002) 109.
[33] Ibid. 111.

However, the situation is different in the case of total war. As long as total states stepped out as a result of a few centuries' historical improvement – we could also say that as a result of democratization – total war was nothing else but the result of a series of decisions made in the area of politics formed in a few decades, of which only partial historical pre-improvement can be discovered.[34] The picture of total war appears in places where in order to tackle armed resistance civil citizens are also involved in direct martial operations.[35] It therefore explicitly comes that:

1. the meaning of differentiation between hinterland and battlefield ceases to exist;
2. and wars are fought on the ground, in the air and on water at the same time, forgetting about civil participants and using every resource in order to annihilate the enemy.

Of course, total war necessarily arose from the revolution of defence, from the improvement of technology and also partly from the state becoming total. However, we must not forget that their exploitation was defined by decisions in the power area of politics, hence, by human nature. People of the 20th century threw out a whole range of law improvements' results of the previous centuries for the throne of power. Realizations of total war – that is world wars – threw away the value of rationality, sophisticated rules of law and created wars as games of zero value.

The realization of total war is a tragedy because of its limitations, while from the point of view of law, it is an inductive effect. Totalitarianism, which twisted total state and realized total war, pointed out numerous guarantee absences in the area of law. During the cold war these were slowly – in a lopsided way –

[34] Theoretical and practical modes of war' improvement against partisans from the end of the 18th until the 20th century can be listed here. *See* SCHMITT: *op. cit.* (2002) 124-162.

[35] This period, as I have already mentioned it in connection with camps, starts with the end of the 19th century. Previously, example can only be found in tools of terror against wars with partisans.

supplied by the states. By nowadays these are improved legal guarantees and the whole spectrum of rule of law what grew out of disgraceful historical experiences. However, history produces newer and newer open questions, among which there are the anticipation of an outbreak of a new total war and the strengthening of strange forms coming from asymmetric warfare (partisanism, guerrilla activity, terrorism, etc…) as factors forcing defence's continuous renewal and re-imagination.

5. TOTAL STATE – TOTAL DEFENCE?

When interpreting Schmitt's total state and total war, we have to investigate their relation to each other in order to find the answer to the following question: Does totalitarian state have total defence, too?

As I have previously highlighted, from political point of view there are no "neutral" questions in a total state, hence, the nation's political nature covers every relation. Besides, total war means nothing else but that war goes on in every possible area and coming from its nature, the hinterland-battlefield duality loses its importance, and every possible resource is needed to be used in order to win. Referring to the latest challenges we can say that resistance and attacks against states and societies have become total, hence, it uses every tool – civil and military as well – and expands to every conditions of life. The question is open: how can total state and total war be connected besides those wars are fought by the states.

It is Schmitt himself who provides answer to this question in relation to sovereignty when he notes that *"Sovereign is he who decides on the exception"*.[36] The unique condition's institution is what connects total state with total war, and which also opens ways

[36] SCHMITT, CARL: *Politikai teológia* [Political Theology], 1992, Az ELTE Állam- és Jogtudományi Kar TEMPUS Összehasonlító Jogi Kultúrák projektumának kiadványa, Budapest, 1.

towards the question of total defence. From historical perspective, unique condition is nothing else but a period in a nation's life which goes together with interstate war, civil war or expanded confusion, suspends normal – peacetime – legal order's rules and makes the introduction of special legal order necessary in order to quickly and effectively neutralize threat.

Hence, total war itself is a unique condition, the majority and the origin of armed defensive organizations' that came to life as a result of long historical improvement are connected to this institution, and most of these are meant for carrying out attacks.[37] However, this period, as its name suggests, too, is unique, and it is foreseeable – especially in view of modern differentiation of a nation's armed organizations of violence – that institutions organized to handle these cannot function in normal conditions or only very restrictively.

Hence, states always need bodies guaranteeing the application of qualified violence, hence, such institutions' maintenance and operation is necessary under normal condition as well, however, with mostly protectional functions. Their task is to identify, anticipate, avert and neutralize attacks. Without these, guaranteeing a normal state's performance would be impossible, that is maintaining satisfaction, order, safety and peace.

However, determining what can be considered as attack in normal condition is a political question, and as we know, there are no politically neutral ones in a total state. Therefore, in a total state in case of normal condition total defence functions, which, regarding political identification of attacks, their anticipation, avert and neutralization is total, covers every aspect, as it can apply adequate activity in every possible relation adhering to legal order.

This preposition can be especially justified these days when historical improvement has completely modified the range of attacks. Nowadays, those are not classic, symmetric interstate wars that mean

[37] Which is even true if a war starts with an attack as very likely the indispensable counter-attack is by no doubt an attacking behavior.

the most dangerous attack factor in state relations but international terrorism, arms trade, international organized crime, failed nations and cyber-threats. In their – many times interrelated – danger zone defence has to operate in a new way, which mode simultaneously ensures the best possible effect rate in the protection of citizens and the justice of legal nation.

These forms of threat – even if such tendency can be found in world politics – cannot be identified with times of war as their realizers usually cannot be substituted in the role scheme of interstate or civil war, moreover, these are mostly internal security questions which are realized not mainly as permanent, systematic and open hostility but as hardly localizable and identifiable, sparse attacks. New threats abuse guarantees and possibilities provided by normal condition, guaranteed legal institutions provided by the normal legal order and technical possibilities provided by civil life to the most extreme.

This can only be fought against if the sovereign determines action's way and mode – in a judicious way but with ensuring guarantees – in a wide circle and ensures adequate organizational, personal and material conditions for it that is, it totalizes defence.

All in all, I believe that a total state's defence is total, as all mentionable relations and circumstances may gain relevance regarding measures, and this tendency is not only justified by the nature and historical root of a total state but the age's challenges, as well. Besides, we must not forget that defence institutions have significant tasks at the time of special condition as well, and they always have to be ready to fulfil these, which needs innovation, preparation at times of peace, too. However, total defence does not mean that a defence system can be invested with over-power, as based on historical experiences it is not the characteristics of a total state but of totalitarian regimes.

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Júlia FEHÉR

Aspects for the Establishment of More Efficient Communications Consumer Protection

1. INTRODUCTION

"Those enterprises which make those television programs accessible or ensure the usage of telephone or Internet access (that is, so called electronic communications service providers) have become integral parts of our lives. We cannot really find such consumers in Hungary who would not use some kind of electronic communications service, hence, consumer protection has an especially significant role in this area."[1]

First of all, let us practice some self-criticism: clearly, we consume practically everything, especially what is fashionable, multifunctional, intelligent/smart (even more than us) broadband or is made according to the latest technology. We are as greedy as uninformed and incautious, hence, later (to a great extent) complainant. "Informed customers" demand is a category repeated till boredom in relation to general consumer protection and together with it in all of its specific branches. Strategies and projects worked out for this objective are mostly high quality and catchy works, however, their realization is less developed. More precisely, the effect of becoming informed consumers fails to succeed, which main reason, I believe, is that there are not any adequate communication channels for the information's transmission.

With writing this study, my main objective is to call the attention to problems and represent the legal relations' subjects in

[1] Electronic communication (telecommunication), http://nfh.hu/magyar/hasznos/hirkozles [cit. 2014-01-01].

their natural light, point out their mistakes and last but not least, find appreciable (and effective) solutions.

Besides that in many cases (contractual) legal relation is already wrong at the starting point, during its accomplishment (provision, requisitions of services) we can find sources of conflicts and areas of injuries. We can mainly trace them in billing disagreements, increasing tariffs, quality of services and in their contents, one-sided (provider) modification of contracts, terminations, limitation of services, handling of complaints, troubleshooting, etc. After the inconveniences, the following question comes up: who should complainants turn to, through what kind of process can they get "gratification", or which bodies, authorities are entitled to remedy consumer complaints?

Most answers can be found in the legislation, in SCCs (Standard Contractual Clauses), therefore, these are not unanswered questions, only their public knowledge is missing. Our task is to somehow inform the public on this extremely important information and create general practices from them such as the application of TANTUSZ-program, the process which precedes and helps purchase, hence, in one word; we need to create informed customers! I would like to suggest such strategies which do not regard the above mentioned objectives as utopia but with simple and greatly aimed solutions can even achieve them!

However, we must not forget one thing (it may seem obvious but still…) consumer protection is mainly intended to create a balance system between the market relation's two parties; the consumer and the producer-retailer (in our case, communications provider) so that consumers have their optimal decision opportunities and their interests are realized in the most efficient way. This supportive-assisting function is tried to be carried out with the help of education, the right to be informed and the right to legal protection, the right to legal remedy and law enforcement,[2] however,

[2] FAZEKAS, JUDIT: *Fogyasztóvédelmi jog*, 2007, Complex Kiadó, Budapest, 71.

it always supposes a circumspect, deliberately acting consumer who wants to get information.

2. FOUNDATION

2.1. Communications and consumer protection – encounter of legal areas[3]

At first, we have to give a definition to *communications* as a whole: we can understand it as a general definition, a generic term which includes various forms of the transmission, storage and processing of news and information, hence telecommunications services (including public and private, wired and mobile telephones and data transfer), radio and television broadcast, program distribution and program division and postal services.[4] Among the frames of my current study, I mainly concentrate on electronic communications, which can be defined as the followings:

Electronic communications service is a service mostly done for somebody else for a remuneration, which service fully or partly consists of the transmission of signals (signaling, writing, motion, sound, etc.) through electronic communications networks[5] and where

[3] Consumer protection aspects of communications regulation have been dealt with since telecommunication act was enacted in 1993, these two areas' mutual set as a special cooperation area is part of the scientific work dealing with communications administration – says *Koppányi Szabolcs*, who described the mutual regulation objective and authorities' way of cooperation. *See* KOPPÁNYI, SZABOLCS: *Hírközlési jog az európai közösségben és Magyarországon* [Communications Law in the European Community and in Hungary], 2003, Osiris, Budapest, 326-329.

[4] GERENCSÉR, BALÁZS: *Elektronikus kommunikáció* [Electronic Communication], available at: http://diakvallalkozas.ktk.nyme.hu/INFOMAN/comm.html [cit. 2014-01-01].

[5] Electronic communications networks are such equipment and other resources which serve for the controlling of transmission systems and signals which make transmission of signals possible between given

it is understandable, also of its control.[67] The activity ensures the transmission of the above mentioned signals[8] through electronic communications networks to one or more consumers. Regarding its essence, it is some kind of a mediator activity.

Electronic communications services can be divided into three big categories:

1. telephone service (localized to a place – wired and mobile);
2. radio and television broadcast, program distribution and program division;
3. internet access service.

The three great mobile phone companies (T-Mobile, Telenor and Vodafone) together with cable television companies, companies providing satellite broadcast, enterprises providing wired phone and internet subscription, furthermore, providers performing IP-based (Internet-Protocol)[9] telephone service or program distribution[10] belong to the group of the most well-known electronic communications providers.

It marks the importance of cooperation between electronic communications and consumer protection that the act on electronic communications lists among its key concepts, if not marks the protection of consumer interests as the most important issue in connection with its relationship held with all members of the

endpoints through cables, electromagnet way, hence, satellite networks, wired and mobile networks below the ground, cable television services.

[6] Act C of 2003 on electronic communications (hereinafter: Eht.) Art. 188. para. 13.

[7] Content service or services practicing editorial control on such contents and enterprises providing mobile-service and electronic commerce are not classified as electronic communications services.

[8] In case of phones sounds, in case of television picture and sounds, in case of Internet, volumes of data.

[9] IP is a standard ensuring the communication of intersections connected to the Internet (computers, network tools, webcameras, etc.).

[10] Circle of electronic communications services. Available at: http://www.nfh.hu/magyar/hasznos/hirkozles/hirkozles_2/hirkozles1.html [cit. 2014-01-01].

communications market: in relation to the existence of services according to entitlement, free choice among services and service providers, public visibility of services and resorting to them on the smallest available price and highest quality, providing up-to-date information and protection of consumers' interests from service providers.[11]

The most important body which is responsible for the coordination and controlling of communications (and media) – and the protection of consumer interests – is the National Media and Infocommunications Authority – Hungary (I am going to mention it in detail in chapter III on the proceeding authority.) Let us see the other half!

Consumer protection is an emphasized, horizontal area of the economic policy and primarily aims at creating balance between consumers and sellers of products so that consumers' rights are realized to the fullest possible extent, more precisely, validation of consumer interests is ensured in front of manufacturers, retailers and service providers.[12] The legal area was comprehensively regulated in Act CLV of 1997, which, according to the consumer protection policy of the European Union, marks those five principles which are cardinal points of consumer interests' protection. These are the followings: protection of consumers' health, safety and economic interests, providing information and education for consumers, justification of consumer needs and finally, consumer representation.[13]

Mainly the *Hungarian Authority for Consumer Protection (HACP)* and its regional branches are responsible for carrying out

[11] Eht. Art. 2. point b).

[12] Description of consumer protection authority. Available at: http://www.nfh.hu/magyar/informaciok/bemutatkozas [cit. 2014-01-01].

[13] Website of the Ministry of Social Affair and Labor. Available at: http://www.szmm.gov.hu/main.php?folderID=1139&articleID=32432&ctag=articlelist&iid=1 [cit. 2014-01-01].

consumer protection tasks. Among its spheres of competences[14] it proceeds in frames of other services in case of consumer trespasses related to communications services:

1. operating customer service;
2. process and handling subscription bill complaints on the side of service providers;
3. bill content;
4. among regulations referring to information of subscribers from service providers.

The investigation of requirements referring to the content of SCCs and unique subscription contracts, the revision of SCCs do not belong to HACP's sphere of competence.[15] These tasks are carried out by the Department of Communications Supervision of National Media and Infocommunications Authority – Hungary (NMIAH), for which they sign a cooperation agreement which is annually revised by the authorities.

The increased need of consumer protection is justified by two things in the sphere of communications: on the one hand, the information asymmetry between the parties, on the other hand, or strongly connecting to it, the vulnerability of consumers in the following relations: in this sharp market race service providers are developing more and more complex, complicated products (roaming tariffs), which essence, economic and legal background and possible risks (for instance consequences of breaching loyalty contracts) are not understandable by general consumers; not transparent pricing and costs; inadequate information of consumers (not clearly understandable, deliberately misunderstandable information suitable for deceit, withholding of risks or simply lack of giving

[14] Introducing Hungarian Authority for Consumer Protection, available at: http://www.nfh.hu/magyar/informaciok/bemutatkozas [cit. 2014-01-01].
[15] Consumer Protection Inspectorates' spheres of competence, available at: http://www.nfh.hu/magyar/informaciok/ellenorzes [cit. 2014-01-01].

information).[16] Having regard to these circumstances, too, we investigate these two legal fields' mutual set.

The Parties signed the cooperation agreement in January 2008 based on provisions of Eht.,[17] in this study I am reviewing the priorities of the authorities' cooperative work based on the currently operative – 4th June 2012 – cooperation. They set mutual tasks according to five principles:[18] providing information, consultation; mutual action for protecting consumer rights; authority decisions, sending summaries, providing information on authority decisions; providing information for the public and consumers; keeping contacts.

Criticism formed in connection with the Agreement: there are only a few obligations and many possibilities! Concretely fixed obligations would be necessary for flexible, still, coordinated work, furthermore, strictly demarked tasks and spheres of competences, procedural entitlements, compulsory consultations and inspections are needed.

As regards the mutual sending of revision plans, I do not believe that it is by all means necessary as they can influence each other's practice. It is more practical if both authorities carry out the revision process according to their own practice – because they investigate upon their own perspectives – and they inform each other on its results and consequences, implying obligatory consultation

[16] VERES, ZOLTÁN: *A pénzügyi fogyasztóvédelem alapjai* [The Basis of the Financial Consumer Protection] (manusscript), 2012, Budapest, 3. In the referenced source's ternary listing the Author marks persistence of information asymmetry in financial sphere and consumer vulnerability. I believe that the mentioned problem issues succeed in the field of communications market, as well.

[17] Eht. Art. 21. rules on the cooperation requirements of the two authorities in issues relating to the electronic communications market and services connected to the information society's services and cases related to consumers.

[18] Cooperation Agreement, available at: http://www.nfh.hu/data/cms69903/NMHH_honlapra.pdf [cit. 2014-01-01].

afterwards. Ideas coming from different aspects can lead to more worked-out results.

Disadvantageous consequences of the lack of concrete distribution of spheres of competences are shown in practice, too, especially in the case of complaints regarding billing. Approximate anchorage of the two authorities' spheres of competences is futile, demarcation is not obvious.

The result will be the back and forth movement of complaints – besides the mutual information of customers – which, in a not condemned way will result in the decrease of consumer trust towards the authorities.

2.2. Subjects of legal relation

Differentiation among consumers-subscribers-users with regards to person, objective and contractual relation:

Consumer, whether we refer to wider or narrower subjects' circle, can only be a natural person[19] who resorts to services for private aims. In consequence, besides being natural persons, both subscribers and users can be legal persons, economic companies or other organizations without having legal personality, who, besides private aims can proceed for business aims, too. What serves as the differentiation of the last two categories is the contractual legal relation which is exclusively the inherent of subscriber nature. The user only uses, resorts to the given electronic communications service. In most cases, the two categories of course overlap each other. We can see that in this circle the user is the smallest subjective category.

Service providers: Those enterprises belong to the circle of electronic communications services which provide and carry out phone service (wired and mobile), Internet service and radio-

[19] In case of accomplishing the contract and besides it breaching obligations connected to the quality of the service, it became possible for small and mid-enterprises to have that type of protection for which customers are entitled to.

television division,[20] broadcast[21] and distribution.[22] The list of service providers is incredibly long[23] (currently there are 917 operating/active service providers in Hungary), based on their size and income, they present a really wide scale.

Among service providers, we must mention universal electronic communications service providers and (JPE) providers possessing significant market strength.

3. CONSUMER PROTECTION IN COMMUNICATIONS

Consumer protection tasks connected to communications are mostly carried out by the Department of Communications Supervision but the Media- and Communications Commissioner also has significant part in the area (true, with a unique legal status). Previously (before 2010), the remedy of allegation of injuries based on incoming complaints was the task of RCCR.

The first and most important body is the *National Media and Infocommunications Authority – Hungary*, which is a self-regulatory body existing since 11st August 2011, based on Act LXXXII of 2010 on modifying acts that regulate media and communications.

But before investigating the now existing institution, it is worth looking at the precursor institution called *National Communications*

[20] During program distribution, signals produced by the service provider get to radio and television broadcast channels and program division networks through wired (cable) networks, furthermore above ground or satellite systems in unchanged content.

[21] Broadcast is a one-sided telecommunications process carried out by above ground or satellite systems for transmitting sounds, pictures and other signals.

[22] Simultaneous, unchanged transmission of produced broadcasting signals to the receiver in an electronic way. (Communications-statistical database.) Available at: http://webext.nmhh.hu//hirk_stat/definiciok.nhh?&fejezet=8&nyelv=0 [cit. 2014-01-01].

[23] List of service providers: http://webext.nmhh.hu/hir_szolg/app/search.jsp [cit. 2014-01-01].

Authority (NCA), which, besides the protection of interests, formation and maintenance of efficient competition and supervision of service providers' lawful behavior, also laid significant importance on consumer information as the first (preventive) aspect of protection of interests, which is especially significant from our theme's point of view. In the frame of this strategy, various educational, informational materials have been published, just like *Raising consumer consciousness in electronic communications markets*[24] or *What, where, how? Useful information on communications services and consumer rights*.[25] The establishment of TANTUSZ portal was significant. It is a (still actively) working, continuously updated information website which helps users in choosing the most advantageous mobile-, wired-, Internet or cable TV service based on individual consumer habits. It provides information on roaming prices and offers of companies providing broadband Internet-access. Hence, the search engine of the portal concentrates on two main areas: tariff comparison and service location. Making authorities' customer service modernization, protection against accidental roaming, web information on service providers' quality traits, free-access spam-filter programs and softwares for the detection of spy-programs available is not negligible, either. The ideas and their realization is praiseworthy, very spectacular, easily understandable and direct, with one deficiency (which was the obstacle of reaching the final aim): it was not "advertised". Only few percentages of people visited the website of the authority and few people knew where to get information from. Knowing all these, let us see how the prosecutor works!

In its communications-controlling activity NMIAH controls the appointed certificate organization, carries out general control and market control in the area of electronic communications, makes annual inspection and supervision plans, then, after carrying out the

[24] *See* http://nmhh.hu/dokumentum/1747/fogy_tudatossag_kiadvany_v5.pdf [cit. 2014-01-01].

[25] *See* http://nmhh.hu/dokumentum/537/nmhh_mitholhogyan_tajekoztatoki advany_web.pdf [cit. 2014-01-01].

investigation, makes an account on their results, calculates and "collects" supervision charges and calls then obligates service providers to fulfil their data-providing obligations. Building authorization means a separate part of its tasks, during which it carries out procedures of inspection of constructions and authorization procedures. Regarding our study, market inspection[26] and its general inspection procedures have great significance as they (may) greatly affect consumer-, subscriber-, user rights.

Authority procedures based on requests are complaint handlings' "most efficient methods". (After the service provider has previously fulfilled[27] its tasks regarding the investigation of consumer complaints and announcements.[28][29]) The service provider has 30 days to investigate written consumer requests. It is obliged to send the result of the investigation to the client in written form, in case of rejection, explain it. If the service provider very likely violated rules on electronic communications or SCS, the consumer, in form of a request, can turn to the Authority for carrying out authority inspection procedure. If the client's request adheres to the

[26] Market inspection aims at the controlling and enforcement of defined and undertaken obligations in legal provisions referring to electronic communications, authority provisions, directly applicable EU acts, general contractual conditions. *See* http://nmhh.hu/cikk/727/Tajekoztato_az_ elektronikus_hirkozlesi_piacfelugyeleti_eljarasrol [cit. 2014-01-01].

[27] In case of bug reports, the fastest solution is when the complainant's announcement is made to the service provider's customer service on their bug report number, with providing identification client number. The service provider is obliged to investigate the problem within 48 hours and inform the subscriber on the modes of fixing the problem.

[28] Eht. Art. 138.

[29] It is the service provider's legal obligation to operate a dial-up customer service with personal availability and Internet accessibility for the handling of subscriber and user announcements, investigating and remedying complaints. Subscribers have to be informed on the conditions and modes of complaints and announcements, deadline of investigation and in case of settlement of disputes, consumer protection bodies, authorities and courts that have the right to carry out procedures.

formal and content obligations (one has to hand in the request exclusively in writing or through client portal, on such form or blank of the Authority which was especially written for this aim,[30] obligatory contents of the requests besides clients' identification data and the description of the grievance), a first instance procedure starts according to the rules of Ket., during which procedure the requester is regarded as a client, hence, clients' rights and obligations behoove to them.[31] The fee of the communications general authority procedure is 3000 Ft[32] which has to be paid via transfer before handing in the request. The authority's administration deadline according to main rule is 45 days, which, in a reasonable case, can be extended with 30 days at one time.[33]

The authority, during the application of legal consequences has to follow the principles of equal treatment, gradual steps and proportionality. As a legal consequence, it orders service providers to cease and stay away from unlawful behavior and to attest legitimate behavior. The Authority can ban the certification of unlawful behavior, it can determine obligations, apply further legal consequences or enter into authority contracts. As the most important (and most frequently applied) sanction, it can determine fines according to conditions set in law, however, in every case it has to be in the value which is suitable for the retention of further unlawful acts.[34]

The client has the right to appeal[35] against the first instant authority decision of the Authority (exclusively those who participated in the first instance case) to the President, who, based on

[30] Eht. Art. 32.
[31] *See* http://nmhh.hu/cikk/2788/Hogyan_nyujthat_be_kerelmet [cit. 2014-01-01].
[32] 5/2011. (X. 6.) NMIA regulation on administration service fees and modes of payment of the National Media and Infocommunications Authority - Hungary's certain procedures, Art. 9.
[33] Eht. Art. 31. para. (1)-(2).
[34] Eht. Art. 48-49.
[35] Eht. Art. 44. para. (1)-(2).

Mttv. 112. § (2),[36] delegated second instant authority decisions' power to the vice-president, and in whose name the second instance decision-preparing department acts. The investigation of resolutions made here can be requested with an action from the court carrying out administration tasks, for which only the Metropolitan Court of Budapest is competent. In the contentious procedure the Authority is represented by the NMIAH's directorate of law.

With market inspection procedures started upon requests, hence, in connection with the handling of complaints, the question whether real legal remedy, therefore, insuring the possibility of appealing within the Authority is really needed or not may arise. With taking the published resolutions into account, in most cases confirmation and the request's rejection, in certain cases confirmation but (confirming certain points of the request or regardless of appealing) alteration of the first instance resolutions (in one or two cases obligatory/calling orders such as appointing delivering delegate in case of foreign service provider) were born. Order for starting a new process barely happens/has happened. That is exactly why it is questionable that whether besides making the process longer, it substantively contributes to the successful carrying out of the case or not. Perhaps the "dropping" of second instance, hence, real legal remedy (appeal) against Authority resolutions could be advisable, hereby making direct court investigation possible with regards to market inspection procedures started upon requests. This solution is not without precedent, the then *Hungarian Financial Supervisory Authority's (HFSA)* authority procedure operated in similar one instance procedure, against its resolutions court investigation could be used. One the one hand, this solution would be reasonable in order to simplify procedures, on the other hand, it would serve the decrease of second instances' workload.

Readers surely recognize the relevant difference between the two authorities' (precedent and successor) description. This is not by chance. Obviously – as being a public administration authority –, the

[36] Act CLXXXV of 2010 on media services and public communication (hereinafter: Mttv.).

carrying out of investigation procedures and the handling of complaints meant integrant, if not the most important parts of NCA's tasks but besides these (as the brochure on raising consumer consciousness shows, too) improving consumer protection was its strategy's priority, as well. Compared to this, we can feel recoil in the present situation. Besides that both the Authority, the President and the Media- and Communications Commissioner are the committed invokers of consumer protection, their manifestation in the outside world is not seen (enough). What has happened? Where have the previous ambitions and objectives gone? Unfortunately, we cannot say that compliance is the reason of the relative "silence". It is sad that the program set forth by NCA has not found followers.

The Media- and Communications Commissioner's (regarding its legal status it is important that it does not have own authority competence or licences, one acts as official of the authority) status was created by Mttv. The need for this unique communications consumer protection-type carrying out of tasks and building out organizational frames for this is determined in the European Community's frame regulation system on electronic communications, too. Hence, not only national needs but the obligation of law harmonization also justified the formation of this institution. The Representative of the Communications Consumer Rights' (RCCR) mainly used "soft-law" tools in carrying out his/her activity: s/he cooperated and signed agreements with service providers, published offers, did mediator activities between the service provider and the user, in justified cases turned to the public with market phenomenon, problems and their solutions in order to provide more effective information.[37] In short, one operated as informational and connectional centre between consumers, subscribers and other market parties that is service providers, authorities and other civil organizations. The representative could operate *ex officio* in cases of

[37] ARANYOSNÉ BÖRCS, JANKA – LAPSÁNSZKY, ANDRÁS – SPAKEVICS, SÁNDOR: *A hírközlési igazgatás kézikönyve* [Handbook of the Communications Administration], 2010, Complex Kiadó Jogi, Budapest, 401-402.

complaints and recognition of unlawfulness. The representative was obliged to investigate requests handed to him and to apply actions regarded as expedient. He especially put emphasis on the information of consumers and expressed it in many calls and work plans which contained relevant parts of his program.

The Commissioner's dual spheres of activity – coming from its name, too – follows NMIAH's dual system. On the one hand, he proceeds in consumer grievances of electronic communications services and press and media services, and in connection with consumer information, too. His processes can only be started upon complaints and in subjects of such behaviour which are connected to providing electronic communications services, cases which are not regarded as the breaking of service rules and do not belong to the spheres of competences of the Media Council, the President or the Authority, but cause or can cause acknowledgeable grievance of users, subscribers, consumers who resort to services.[38]

We have to make an important differentiation between the two service branches as significant differences can be seen regarding authority tools applied during the handling of complaints (it has stronger entitlements in the communications branch). Hereby, we have to mention Resolution nr. 165/2011. (XII. 20.) AB, which is responsible for the inequality of procedural entitlements in the two areas of administration. According to the original regulation, the Commissioner had the same spheres of competences with relation to press and media services, could use the same authority tools (obligation to provide data, carrying out conciliation procedures, concluding agreements, making reports, determining fines) as in the communications branch. However, proponents wanted the annulment of the regulation because of violating constitutional requirements on the limitation of opinion and freedom of press. The Constitutional Court ruled that the Commissioner had such spheres of competences with which he could even investigate questions belonging to the sphere of editorial freedom. Behind his procedure the possibility of authority action and constraint is always there which means the

[38] Mttv. Art. 140. para. (1).

limitation of the freedom of press. Relative provisions have been annulled, hence, furthermore it is only represented in the field of media administration as an institution having mediation part, cooperating with service providers.[39] Knowing this, we can question the efficiency of the "2 in 1" concept. I believe that the previous RCCR perfectly fulfilled the role what it was meant for, regarding the handling of consumer complaints, information programs and media representation (interviews, ask-answer in chat), they would have only had to work on increasing efficiency. The plan to realize this kind of protection in a contracted status on the field of media administration, as we could see, bumped into constitutional limits, resolutions referring to this were annulled by the Constitutional Court. Hence, we can experience it in the current situation that plans wanted to be achieved through contraction could not be realized but resulted in "regression" on the field of communications, too. From this point of view, we can talk about a quite disadvantageous organizational action. As a further problem, (deficiency), the disregard of the already well-known "information strategy" can be mentioned. It is a great mistake as we could see that they created the starting points and via carrying them on, the objectives could be realized. It would need to use those tools that are applied by service providers! NMIAH could call consumers' attention to be mindful, to the existence and applicational advantages of TANTUSZ portal and locations of other information. Although previous projects could have been perfect regarding their form and content, they did not reach consumers. Using media could be the most useful and efficient tool.

[39] OROSI, RENÁTA: manuscript on the Commissioner.

4. PROBLEM MAP: MOST FREQUENT CONSUMER COMPLAINTS AND GRIEVANCES (AND STEPS TAKEN FOR THEIR SOLUTION, PREVENTION)

The majority of consumer complaints come from the unmatched relation system. Dominant participants of communications services' markets are obviously the well-known giant service providers whose most important interest lies in maintaining, widening the circle of clients and increasing income. They try to achieve it with greatly constructed marketing, colourful advertisements, imaginative tariff-names (Mozaik, Like, Fun, Kaméleon, Red, etc.) untransparent discount-sets (and hidden real tariffs and band widths). The tight competition's and overbidding's disadvantageous consequences however come quickly, mainly on the disadvantage of consumers.

According to applications sent to RCCR (2009), the most frequent problems are the followings:[40] excuses in connection with Unique Subscriber Contracts and SCCs; complaints questioning adequate billing; unwanted incoming premium SMSs; questions on the pricing of mobile phone internet access; unintentional roaming; troubleshooting time; broad widths (data traffic speed); verbal entering into contract; clauses of loyalty contracts. Because of content limitations we are dealing with subscriber contracts among the above listed items.

4.1. Complaints in connection with SCC and Unique Subscriber Contracts, anomalies of loyalty contracts

We regard this category as the most comprehensive because it means the hotbed of most complaints.[41] It is obvious that contractual freedom based on juxtaposition has serious violations in such

[40] ARANYOSNÉ – LAPSÁNSZKY – SPAKEVICS: *op. cit.* 313-315.

[41] *See* LAPSÁNSZKY, ANDRÁS: Hírközlési igazgatás [Communications Administration], in LAPSÁNSZKY, ANDRÁS (ed.): *Közigazgatási jog – Fejezetek szakigazgatásaink köréből II.* [Administrative Law – Chapters of Sectoral Administrative Law], 2013, Complex Kiadó, Budapest, 258.

markets where services are massively resorted to and legal relations are created just like assembly line made mass production (the market of communications is typically like this!). "Customers" sign pre-constructed contracts (written by service providers), hence, consensus is made via that subscribers' accept the given conditions. This unequal situation – on the reason of civil protection (and obligation of legal harmony) – prompts law-makers to limit, regulate contractual conditions, have regulations on content and formal elements and determine the conditions of entering into, modifying or ceasing contracts. Law-makers partly fulfil it in form of acts (Eht.), partly via authorizing the President of NMIAH in form of provisions [6/2011 (X. 6.)].

Hence, resorting to services by all means lies on signing the subscriber contract, which always consists of a unique subscriber contract (can be entered into verbally, in written form or with behaviour referring to it) and SCCs in written form. We are talking about such civil law contracts which important elements are determined by rules referring to electronic communications and parties can only deviate from this with the same intention in unique subscriber contracts for the advantage of subscribers.[42]

SCC: The service provider providing subscriber services is by all means obliged to make a SCC referring to the given communications service, announce it to the Authority and make it accessible for public. It has to be easily understandable, consistent and transparent, advocating clients' appropriate gaining of information. It is an important regulation that they have to send the unified, modified SCC to the Authority 30 days before the modification enters into force and have to inform clients on all modifications.

The Supervisory Department carries out investigation activity in relation to all SCCs, which, according to given criteria, happens via preserving around 140 important content elements; as regards acts,

[42] Ibid. 353.

relating regulations of Eht. and 6/2011. NMIAH regulation[43] gives directions. Formal and content regulations also belong to the requirements. In the subject of SCC investigation the Authority rules in orders and calls service providers' attention to modify, delete or supplement the disapproved points. With this activity, the organization carries out preventive activity as it goes ahead of grievances via the early cease of service providers' trespasses.

In connection with SCC, I would like to call the attention to one more thing; this is being the fixed form of possibilities and conditions of one-sided modification of contracts from the part of service providers. Eht's adhering regulation would assist the solution to the problem, which lists those cases in Art. 132. para. (2) when service providers may modify subscription contracts covering unique subscriber contracts in a one-sided way. Among these, points b) and c)[44] give reasons for misunderstanding, widened interpretation in many cases. Regarding that in most cases one-sided modification of contracts manifests in the increase of tariffs, reasonably leading to lots of consumer complaints. Service providers as *significant changes due to previously not seen circumstances* "try" the most various reasons in order to legalize their one-sided modifications: decline in economic life, inflation, unexpected costs, technology- and system innovation constraint in order to keep the pace of the race, significant decrease in certain tariffs' subscriber number, hence, specific costs of tariff-maintenance's inevitable increase, introduction of telecommunications tax, etc. The Authority rejects appeals based on these arguments saying that all circumstances can be foreseen, costs and risks can be calculated, hence, these are not reasons for one-sided modification. Service providers consider the Authority's such behaviour as clearing places of regulations, saying that they do not have consistent argument to which they can correlate based on which the nature of significant change in circumstances

[43] 6/2011. (X. 6.) NMIAH regulation on rules of electronic communications subscriber contracts' detailed rules (hereinafter: Eszr.).

[44] b) Legal changes or authority decision. c) Significant changes in circumstances not seen at the time of entering into contract.

(clausula rebis sic stantibus) can be determined, hence, in practice, it seems that service providers are continually trying and the Authority rejects them in all cases ('guess what' phenomenon). To this, NMIAH's answer is that the nature of significant change cannot be taxatively determined as all cases have to be separately investigated, all cases can set new, relevant circumstances, what is a significant element is that circumstances have to be not foreseeable, unavoidable and directly have to refer to a legal relation. However, consistent law-making and law-application desires the so-called reason-list, which would lay down those cases to which (and only to them) they can advert as reasons of one-sided modification of contracts. The existence of reason-list is not without antecedent, in the financial sphere the Bank Behaviour Codex[45] of 2009 has similar content, which is also substantively applied. Regarding that service providers do not always leave the rejection of appeals without a word and ask for court revision, sooner or later an accepted court practice will be formed which will concretize the nature of significant change in circumstances, (too).

Taking the broad content of SCC and its complicated legal language into consideration, it would be desirable to oblige certain service providers to issue a SCC extract. The idea is not new,[46] it can be traced on some service providers' website, however, based on individual experiences, these cannot be found in any service providers' stores, even if its role in customers' information cannot be doubted. The 6-7 pages long extract would definitely reduce the number of complaints with its most important points – rights and obligations – of conclusion, entering into, modifying, ceasing contracts, tariffs and loyalty contracts.

Even issuing a chart containing certain points of SCC or the given service providers' tariff options (and their most important

[45] *See* http://www.mkb.hu/dl/media//group_463afc792a1fd/item_2545.pdf [cit. 2014-01-01].

[46] 16/2003 (XII. 27.) IHM regulation (repealed) Art. 4. para. (4) ascertains that the service provider is obliged to prepare its extract number determined in SCC.

points) as "General brochure prior to entering into loyalty contract"[47] would also serve consumers' choice.

As regards unique subscriber contracts, usually entering into contract verbally or via such behaviour's disadvantages cause the complaints. Entering into contract verbally can be regarded as complete on the day of the phone call, however, regarding the short time of consideration and interpretation, the subscriber can cease the contract without reasoning within 8 days with such constraint that if before the expire of withdrawal period the service provider started the compliance with the consent of the subscriber, the right of withdrawal cannot be practised.[48] Entering into contract with implied conduct (real act), is significant in connection with supplementary services or increased charge services in the field of communications, hence, it supposes a subscriber contract on an already existing electronic communications service.[49] Displeasing situations can be avoided with the extreme attention of subscribers.

Lawmakers tend to regulate the cessation of contracts via termination having regard to the formation of balance situation. They fulfil this in such a way that they ensure the maximum of 8 days (or even immediately) termination period for customers without legal consequences and reasoning with regards to all three types of termination groups (general-, one-sided contract modification-, and exceptional termination). This right behoves service providers in all cases besides their justification obligation and with longer deadline (60 or 15 days). The right of termination's content is different with relation to determined and indeterminate contracts in all termination groups.

Loyalty contracts: We are talking about such clauses of subscriber contracts upon which the service provider gives such

[47] The idea of applying an information chart comes from the financial sector, too, based on Act CLXII. annex nr. 1 of 2009 on credit provided for customers.

[48] 17/1999. (II. 5.) Government decree Art. 5. point a).

[49] ARANYOSNÉ – LAPSÁNSZKY – SPAKEVICS: *op. cit.* 370-373.

discounts[50] for customers having regard to that he/she assumes such obligations[51] during the period of using the service which infringement is followed by determined legal consequences set in the contract. Discounts relating to loyalty contracts encourage consumers to choose without thinking, however, it is worth knowing what we undertake with the (mostly two-year) commitment: by all means more limited procedural possibilities regarding the termination of the contractual legal relation. The fix period subscriber contract ceases with the expiry date of the given contract, prior to this, subscribers can only use extraordinary termination if the service provider has not repaired the announced default belonging to its sphere of interest within 30 days, or if one-sided contract modification contains disadvantageous consequences on the part of the subscriber.[52] In this case service providers are not entitled to claim the so far used discounts. Regarding subscriber termination of other fix period contracts before the expiry date, the used discounts can be claimed by the service provider but they cannot apply any other disadvantageous legal consequences.[53]

[50] Total or partial release of enrolment fee, discount of subscription fee in comparison with indeterminate contract, discount relinquishment or selling of terminal equipment needed for the requisition of service is considered to be reduction.

[51] Obligations in particular: based on reasons coming from their own interests, subscribers do not start the termination of the contract, suspension of service, such modification of the contract which is not made possible by the clause within loyalty time; with their contract breaching behaviour they do not form a legal basis for the service provider's termination or the service's limitation.

[52] However, if the modification of the contract does not affect the resorted reduction, the subscriber is not entitled to terminate it without disadvantageous legal consequence. If the modification affects the discount and the subscriber terminates the contract, the service provider can legally demand the so far used discounts.

[53] How to terminate subscriber contracts? *See* http://nmhh.hu/cikk/2757/Hogyan_mondhatja_fel_az_elofizetoi_szerzodeset [cit. 2014-01-01].

5. INCREASING CONSUMER CONSCIOUSNESS: PROVIDING INFORMATION, COMPARISON AND CHOICE

According to results of the latest researches, conscious customer index shows gradual increase, which is the result of more circumspect choice, successful validation of guarantee rights; at the same time, regarding the areas of exact knowledge of consumer rights and particularly raising consumer consciousness, we have a lot more to accomplish. The expectation and need for the latter one is like an untouchable crust that surrounds us, it means a pressure on us. In many cases we even know what we should do, however, in practice we "do not have time" to adhere to this and we only strive to satisfy our need for service (and follow fashion) at the least possible price. This kind of consumer angle is well-known by service providers, who tailor their marketing activity accordingly. By all means we shall handle over-reduced prices with scepticism, let us have suspicion regarding their real nature. The procedure of "deceptive behaviour" is always service providers' unique tool, which cannot be even regarded as unlawful as it presumes consumer thinking! For more efficient "increase of consciousness", hence for the incitement of consideration and comparison we have to apply similar modes of service providers', we have to make conclusions from actual consumer behaviour and emerging consumer trends and work out prevention strategies based on this.

Consumer trends, consumer behaviours: We basically have to focus on weak points, appoint wrong consumer behaviour types and via reflecting to those, appoint directions of correct thinking and behaviour. Whilst carrying out information programs, the focus point should basically be on the requisition of media with well-structured, colourful, direct, awareness raising sentences constructed with nice background music, we have to manipulatively effect consumers using marketing strategies, just like service providers (if we cannot walk other ways). When working out the program, we have to take the umbrella term of consumer category's nature into consideration, ergo that we aim at a relatively heterogenic group regarding their

personality, social situation and age, as well. Obviously, tailor-made programs cannot be worked out but forming projects according to categories in various styles could be effective. At the time of working out of strategies, we have to pay special attention to functional consumption[54] and call the attention of customers to emotional consumption's[55] dangers, and the consequences of self-expressive, symbolic, "grandiose", offers lacking practicality.

Consumer practice of Germany with relation co communications: first of all, we have to note that such central comparing and search system like TANTUSZ portal that covers all electronic communications services and service providers does not exist in Germany. General consumer protection portals[56] (subject to payment of a fee) and smaller, freely accessible private portals[57] give assistance for consumers who want to be informed in choosing the most suitable "package" for themselves. The general practice is that they read more free portals, gain information about the most suitable tariffs, services, then compare the given results and choose. Optimization is a general practice in Germany, programs' utilization is very high, regardless of possible consequences.

[54] Rationally explainable consumption, purchasing such products, using such services which do not necessarily need explanation, regarding it is a phenomenon accepted on the given social-economic level. Using telephone and Internet services - regarded as primary from our point of view - can be listed here.

[55] Symbolic consumption (which can be self-calming or self-expressive). *See* TÖRŐCSIK, MÁRIA: *Fogyasztói magatartás – Insight, trendek, vásárlók* [Consumer Behaviour – Insight, Trends, Buyers], 2011, Akadémiai Kiadó, Budapest.

[56] *See* http://www.verbraucherzentrale.de/ and http://www.test.de/ [cit. 2014-01-01].

[57] Most advantageous offers given by these pages always have to be handled with precaution as there is no guarantee regarding their independency. It is possible that service providers who advertise on the given website pay extra for the website's operator after signed loyalty contracts.

6. CONCLUSION

What shall that nation do which basically has different temperament, follows other forms of behaviour and thinks differently? As a consumer, it shall learn, get information, change behaviour, use assisting applications and last but not least, bear its own interests in mind! As a national, consumer protection body (NMIAH, HACP, Media- and Communications Commissioner, civil organizations) it shall do everything in order to artificially supplement its inefficiencies, educate, improve consumer consciousness, on the other hand, supervise, regulate its behaviour in its dominant position, oblige service providers to respect consumer rights and aim at efficient, quick and satisfactory remedy of possible grievances, and last but not least, create balance in the imbalanced power-relation!

Let us not forget: consumers are the incentives of the communications market's improvement! Hence, their protection, information, education, and ensuring their right for remedy, recovery, representation of interests, hence, achieving satisfaction is everyone's interest, besides, it is a national objective[58] set in the Basic Law!

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[7] Simultaneous, unchanged transmission of produced broadcasting signals to the receiver in an electronic way. (Communications-statistical database) http://webext.nmhh.hu//hirk_stat/definiciok.nhh?&fejezet=8&nyelv=0 [cit. 2014-01-01].

Csilla GÖMBÖS[1]

Through the "Lenses" of the High Representative – Staffing Issues of the EEAS Review

1. INTRODUCTION

Establishing the position of High Representative of the Union for Foreign Affairs and Security Policy[2] and the formation of the European diplomatic board built around this new position, namely the European External Action Service[3] are the most significant achievements among the amendments of the Treaty of Lisbon (entered into force on 1st December 2009). These reforms of the Treaty of Lisbon creates such conditions for the European Union that enables the EU's more unified and more efficient appearance on international area[4] and makes possible to ensure the unified representation and predomination of the European Union's values and interests.

Forasmuch as that the European External Action Service (hereinafter: EEAS) is an EU organization without traditions, and seeing also the internal and external challenges during the formation

[1] This research was supported by the European Union and the State of Hungary, co-financed by the European Social Fund in the framework of TÁMOP-4.2.4.A/2-11/1-2012-0001 'National Excellence Program'.

[2] The Treaty on European Union (hereinafter: TEU), Art. 18.

[3] Art. 27. para. (3) TEU.

[4] With this the Treaty of Lisbon tries to fulfill the conditions written in Laeken declaration which set off the European constitutional process. *See Laeken Declaration On The Future Of The European Union,* Chapter 1. Available at: http://european-convention.eu.int/pdf/LKNEN.pdf [cit. 2013-12-13].

of the organisation, the Council Decision which serves as the legal basis for EEAS under the "*Final and general provisions"* in its Article 13 lays down that "*by mid-2013, the High Representative shall provide a review of the organisation and functioning of the EEAS…"*[5] Therefore, regarding the number of proposals, recommendations and analyses referring to the review of the organisation, and also the organisation of several conferences, think-thanks, discussion forums and meetings in the theme of the EEAS' review during the last year, 2013 can be proven fruitful year. The High Representative of the Union for Foreign Affairs and Security Policy submitted the official document concerning the review of EEAS' structure and operation in July 2013.[6]

This study aims at examining the EEAS Review based on the official document written by the High Representative regarding the review of EEAS, in particular with personnel issues of the organisation. Before analysing the review and future directions and reforms defined in the official report, it is important to glance at the institution of the High Representative of the Union for Foreign Affairs and Security Policy, which was also a substantial amendment introduced by the Treaty of Lisbon besides the EEAS. This new post made necessary to establish the EEAS, because of the complexity of tasks and competences exercised by the High Representative. Furthermore, it is worth writing some details about the main characteristics and specialties of the organisation. Then, in the second chapter of this study, it recalls the staffing issues of the EEAS, which existed as relevant problems and questionable case at the time of setting up and creating practices of the operation of the Service. Following the reviving of the initial sceptic voices, the "staff" of the currently viable organization is surveyed and then the

[5] 2010/427/EU Council decision (26th July 2010) establishing the organisation and functioning of the European External Action Service (hereinafter: 2010/427/EU Council decision) Art. 13. para. (3).

[6] European External Action Service – EEAS Review, 2013 (hereinafter: EEAS Review, 2013). Available at: http://eeas. europa.eu/library/publica tions/2013/3/2013_eeas_review_en.pdf [cit. 2014-12-02].

Heads of Delegations come to the foreground regarding EU delegations in the view of the revision document written by the High Representative. Finally, the current theme under investigation closes with thoughts affecting EU Special Representatives.

2. THE EUROPEAN EXTERNAL ACTION SERVICE IN A NUTSHELL

2.1. Lady with "many hats"[7] – The necessity for setting up EEAS

Regarding the Common Foreign and Security Policy, it is significant that the Treaty of Lisbon created the position of the High Representative of the Union for Foreign Affairs and Security Policy as an institutional innovation, which ensures the EU's more effective and more unified action on global level, creating a new frame for the EU's external representation.[8] The basic aim of creating this position is to ensure the EU image's more unified international representation, and with respect to the Common Foreign and Security Policy, it is to avoid the possible parallel carrying out of work in

[7] Many studies use the English "hat" word referring to the HR tasks and his/her various positions. According to my opinion it would be inappropriate to refer to the marker "hat" with a definite number. Opinions considering "the number of hats" split in special literature, as well.

[8] Taking content limitations into account and considering current study's essential theme, detailed analysis of the High Representative is not carried out. The introduction of this position is only narrowed down to the most essential issues and to those which are the most relevant connecting to my current theme. *See* further: GÖMBÖS, CSILLA: Egység az átláthatatlanságban? Az EU megerősített nemzetközi szerepvállalása, különös tekintettel a külügyi és biztonságpolitikai főképviselőre és az Európai Külügyi Szolgálatra [Unity in Untransparency? The EU's Strengthened Participation, Especially Regarding the High Representative for Foreign Affairs and Security Policy and the External Action Service], in FARKAS, ÁDÁM – NÉMETH, IMRE (ed.): *Optimi Nostri, Díjnyertes Állam- és Jogtudományi Dolgozatok,* Nr. 1. (2013) 45-60.

institutions.[9] The person of the High Representative merged two previous positions connected to the external actions: High Representative for Common Foreign and Security Policy (Mrs. /Mr. CFSP) held by the Secretary General of the Council, introduced by the Amsterdam Treaty, dealing with second pillar issues, which was held by Javier Solana de Madriga, former NATO Secretary General[10] until 2009, and the position of commissioner regarding the cases attached to the first pillar, namely the Commission's foreign affairs issues.

Hence, due to the institutional merge the two previous positions, the competences regarding Foreign Affairs and Security Policy are concentrated in the tenure of the High Representative. Furthermore, the holder of this position has to cope with more tasks and duties at the same time. On the one hand, the person in charge fills the position of commissioner dealing with the Commission's foreign affairs, and as the vice president of the Commission is responsible for the realisation of activities connected to this institution's foreign affairs. On the other hand, the holder of this position is also responsible for managing various activities connected to foreign affairs and for the implementation of decisions; and is entitled to

[9] The new position created by the Treaty of Lisbon is currently held by Baroness Catherine Ashton, who was appointed on 19th November 2009, with qualified majority of the Council, in harmony with the President of the Commission, for the period of the Commission's current time in office that is, having mandate for the period of five years. *"The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure."* Art. 18. (1) TEU.

[10] Mr CFSP primarily assisted the Council's work on the field of Foreign Affairs and Security Policy; held responsibility for political and diplomatic relations, and missions of Foreign and Security Policy, and, he/she appeared in political dialogues conducted with foreign partners. *See* KENDE, TAMÁS – SZŰCS, TAMÁS – JENEY, PETRA (ed.): *Európai közjog és politika* [European Public Law and Policy], 2007, CompLex Kiadó, Budapest, 411-412.

ensure the harmony and coordination of the EU's foreign activity.[11] This includes the harmonisation of Commission members' activity among each other and of further elements connected to the foreign policy, covering intergovernmental issues as well.[12]

Being connected to the European Commission, the High Representative is also strongly involved into the work of the Council of the European Union. As the HR ensures the continuance and coherence of work in the field of the EU's foreign affairs, s/he possesses common mandate of Foreign Affairs and Security Policy in the European Council. The Treaty of Lisbon modified the system, functions and operation of the rotating Presidency of the Council; hence, the competence of Foreign Affairs and Security Policy got out from the rotating Presidency's direct control, which is already managed by the High Representative and the permanent President of the European Council.[13]

Whereas, among the foreign ministers abolished the rotating presidency, accompanied by previously forming a single ministerial panel General and External Relations Council parted the General Affairs Council and Foreign Affairs Council. Thus the High Representative heads the Foreign Affairs Council on a permanent basis adapted from previous functions the Minister for attending the Council Presidency Member. Although, the Member State given rotating president of the Council had a lot of positive elements regarding its own national policy of foreign affairs because of its role, changes not mean "loss of power" regarding the trio of presidency. Changes shall much more be referred to as a certain kind

[11] Art. 18. para. (2) and para. (4) TEU.

[12] GASPERS, JAN: *The quest for European foreign policy consistency and the Treaty of Lisbon,* 2008, available at: http://www.sbc.katowice.pl/Content/11990/gaspers.pdf [cit. 2014-01-10] 22-24.

[13] The introduction of the position of the President of the European Council is also the reform of the Treaty of Lisbon. See further: Article 15 TEU and Treaty on the Functioning of the European Union (hereinafter: TFEU) Art. 235-236. *See* also GÖMBÖS: *op. cit.*

of emphasis shift – regarding more efficient supply of activities of foreign affairs.[14]

Between the High Representative and the permanent President of the European Council tasks and competences connecting to the EU's foreign actions share; however, the Treaty of Lisbon does not dispose on the exact share between these two positions, making the foreign representation of the EU problematic. It is difficult to determine which position's performance is needed in certain cases. The President of the European Council primarily deals with the representation of foreign affairs, while the HR – as the first diplomat of the EU – manages the common foreign and security policy through diplomatic service (EEAS) exercising the right to propose with respect to this field, and based on the authorisation of the Council, the HR puts into effect certain implementing powers as well. "*The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences."*[15] The practice of nowadays is especially important in order to avoid anomalies coming from the clash of the two new positions' competences referring to the foreign politics of the EU, and in order to bridge possible conflicting competences, and to realise gradually the demarcation of these evolving positions.

However, the Council's central position in the Union's decision making has not been degraded after the Treaty of Lisbon, neither in the formation of foreign policy, the only change is that the High Representative also joins this process.[16] "*The High Representative of*

[14] HORVÁTHY, BALÁZS: Az EU-elnökség intézménye [The Institution of the EU Presidency] in VÖRÖS, IMRE (ed.): *Az EU-elnökség. Jogi, szervezeti és tudománypolitikai vetületek* [The EU Presidency. Aspects of Law, Organisation and Science Policy], 2010, Complex Kiadó, Budapest, 68.

[15] Art. 27. para. (2) TEU.

[16] Regarding the Union's common foreign and security policy's decision making process, the Treaty of Lisbon basically did not bring about

the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council".[17] Consequently we have been facing a very interesting institutional construction, as in the Council the Foreign Affairs Council which is led by him is the one decides on the High Representative's suggestions on common foreign and security policy, and finally, the Council shall authorise the High Representative to implement the decisions. Hence, it is reasonably assumable that a kind of decision-making monopoly is concentrated in the hands of the High Representative regarding the Union's Foreign Affairs and Security Policy.

Such combination of tasks – "*quasi hats*" – allocate the holder of this position to important institutional functions as it provides the High Representative opportunity to move between the EU's supranational and intergovernmental structures – hence, having the opportunity to create a new "centrum of power" in the EU.[18]

2.2. The key features and characteristics of the new diplomatic service

The High Representative needs help during ones activity due to the complexity of one's competences and having regard to their complexity and diversity. *"In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and*

substantive changes. The leading position of the European Council and the Council of the European Union, and the unanimous decision remained.

[17] Art. 27. para. (1) TEU.

[18] GÁLIK ZOLTÁN: A Lisszaboni Szerződés: politikai integráció vagy integrálódó politika? [The Treaty of Lisbon: political integration or integration policy?], in *Külügyi Intézet, Gyorselemzések,* 2010, http://www.kulugyiintezet. hu/indexphp?menu=26&gyors=2038 [cit. 2014-02-01].

of the Commission as well as staff seconded from national diplomatic services of the Member States…."[19] Help given to the High Representative mainly manifests in harmonisation of the foreign EU actions, making political suggestions, and implementation. Hence, this service makes it possible that the High Representative does not have to rely on Member States while carrying out tasks connected to foreign affairs. Events, diplomatic meetings, successful negotiations of the past years can be regarded as undoubted evidences regarding how important role EEAS played a significant part in that the High Representative could successfully and effectively realize the first steps of the foreign political frame's practical realization under the aegis of the Treaty of Lisbon.[20] Furthermore, providing help for the High Representative's work and assisting the President of the European Council, the President of the Commission and its members in their tasks connected to foreign affairs, the EEAS is able to create some kind of coherence on the field of the EU's foreign relations in order to enable the EU's foreign policy to have much more effective realisation, more unified and more successful foreign performance. This can primarily be understated that with the formation of EEAS the EU's most significant foreign policy activity is concentrated in one organisation. However, several reforms are needed to resettle EEAS the only organization responsible for foreign policy; still, this institutional reform means a significant step ahead on the road of political integration.

Besides the above mentioned significance of EEAS, it shall be recognised that with the formation of this service the EU's system of institutions widens. However, this kind of expansion is inherent in the integration process, which resulted in that the level under EU

[19] Art. 27. para. (3) TEU.

[20] To get to know all these activities, mapping, detailed investigation of information found on the website of the organisation in question is an excellent tool. *See* European External Action Service, Publications and Documents, available at: http://eeas.europa.eu/csdp/publications-and-documents/index_en.htm [cit. 2014-02-01].

institutions, the diffuse system of Union offices and agencies has already been formed by now.[21] The newly formed EEAS can be listed as part of this level under institutions.

The Treaty of Lisbon does not intend to settle the organisation and concrete operation of the apparatus built around the High Representative in detail, it only mentions the bases of the service in one article and entrusts its detailed description to the High Representative: *"…The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission."*[22] This decision was born on 26th July 2010 after prolonged meetings, and as the result of meetings rich in compromises and debates. This Council decision fully rules on the organisation during 13 Articles. Pursuant this decision the EEAS is the EU's *sui generis* organization possessing own individual budget, which neither belongs to the General Secretariat of the Council, nor to the Commission. However, EEAS only operates under the lead of the High Representative, helps him in fulfilling ones assignments, and at the same time helps the President of the European Council, the President of the Commission and the Commission in tasks relating to foreign affairs.[23]

EEAS has its own budget which, in a way, impairs control over the organisation, providing the EEAS significant independence and advantages resulting from that in its operation and carrying out of tasks.[24] Considering the budget of the EEAS, it has to take principles of budgetary efficiency and budgetary neutrality into account. In spite of that the EU's foreign policy only forms the small part of whole EU's budget, the EEAS can work mostly successful in this

[21] KÁLMÁN, JÁNOS: Az európai ügynökségek és a Meroni-doktrína [European Agencies and the Meroni-doctrine], in *De iurisprudentia et iure publico*, Vol. 7. No. 3. (2013).
[22] Art. 27. para. (3) TEU.
[23] 2010/421/EU Council decision, Art. 1-2.
[24] 2010/421/EU Council decision, Art. 8.

policy. Available reducing sources can significantly weaken EEAS's successful operation; the best possible grouping of available sources requires careful attention. If we investigate the EU's annual budget we get to the conclusion that the costs spent on the EU's global actions only take a few percentage of it, of which costs of common foreign affairs and security policy again is only a small part; hence, the cost paid for EEAS. For instance, EEAS's budget in 2011 was 476 billion Euros, which was an insignificant part of the EU's annual budget (141.9 billion Euros), and the increase of EEAS's budget to 23.5 billion Euros (5% increase) provoked Member States' displeasure.[25] From the 2013 Union budget (150.9 billion Euros) the 9.6 billion Euros allocated for the service of the EU's global action only meant 6% of the EU's annual budget, out of which we get even worse numbers regarding EEAS's budget.[26] These numbers undoubtedly justify that even though EEAS has its own budget; efficient management of available limited resources provides great challenge for this organisation.

Regarding the subject of present study, the personnel and organisational structure of the EEAS should be emphasised, as well. Although, the best way of representing these elements is if they are investigated in the light of the review, hence contributing to the more obvious comparison of initial and current situations.

[25] On EEAS' 2011 budget see further: European External Action Service, 2011 Annual Activity Report, 2012, available at: http://eeas.europa.eu/background/docs/20121017_eeas_aar_2011_en.pdf [cit. 2013-12-30].

[26] EU budget 2013: investing in growth and jobs, 2013, Luxembourg, available at: http://ec.europa.eu/budget/library/biblio/publications/2013/budget_folder/KV3012856ENC_web.pdf [cit. 2013-12-30]. *See* further on EEAS' 2012 budget: European External Action Service, 2012 Annual Activity Report, 2013, available at: http://eeas.europa.eu/back ground/docs/eeas_aar_2012_en.pdf [cit. 2013-12-30].

3. REVIEW OF EEAS' PERSONNEL ISSUES

It would be a right question that why it is necessary to carry out a review reform only three years after forming the Service, especially because the establishment of this diplomatic service was a significant institutional reform regarding integration and its diplomatic matters. The "obligate" revision – and in doing so, the formulation, envisagement of reforms referring to various areas of the organisation, and the schedule of their realisation – was primarily necessary because of the several challenges coming up at the formation of the service. Mainly initial questions connected to the personnel what could be answered with difficulty meant a great challenge, therefore, it is not surprising that the EEAS revision mainly concentrates on personnel issues.

In the introduction of the official document of the EEAS review written by the High Representative of the Union for Foreign Affairs and Security Policy by July 2013, it can clearly be seen that its most important elements are neighbourhood policy, comprehensive approach – which ensures Union action in all issues related to foreign policy –, and those international questions in which the EU can fulfil a leading role. Making these priorities conscious is inevitable to make the EU's interests, values and those tools visible that make response to global challenges possible.[27] From the above-mentioned areas and tasks can also clearly be seen where and during which provisioning EEAS' activity is indispensable and unquestionable. However, for making its work indispensable in these areas, it significantly contributed that elements essential for the operation of the organization were realized at the time of its formation. Among others, it was obvious that an adequately regulated, efficient and last but not least transparent inner system

[27] LARIVÉ, H. A. MAXIME: *Reflections on the EEAS review* (2013), avilable at: http://foreignpolicyblogs.com /2013/08/22/reflections-on-the-eeas-review/?utm_source=rss&utm_medium=rss&utm_campaign=reflec tions-on-the-eeas -review [cit. 2013-12-20].

with well qualified, loyal personnel having professional experience was necessary in order to form a previously not existing, completely new organizational structure and confirm its stability. Thus, at the formation of EEAS great emphasis was put on its organisational structure and personnel issues.

3.1. Recruiting the EEAS' staff – From initial scepticism to present professionalism

EEAS has a very "sophisticated",[28] combined organisation system divided into multi-level stages and complex staff, upon which it can be reasonably said that this organisation's bureaucratic culture is complex and diverse. At the formation of the organization those sceptic voices appeared that the Union's bureaucracy and together with it the number of officials and civil servants would also increase. According to early approximations, the staff's number of this organization could be even 5-6000. This number does not necessarily mean an oversized bureaucratic apparatus as even Ministry of Foreign Affairs of a big state has thousands of personnel staff. For example, Germany's Ministry of Foreign Affairs' personnel consists of 13 600 people.[29] Even though the growing of the EU's bureaucratic apparatus is not a real fear as the personnel formation of the organisation mainly happened via regrouping and transfer of people from other institutions. Hence, two-third of EEAS's staff comes from employees of the Commission's certain directorates and the Council Secretariat, the rest one-third consists of officers and diplomats sent from Member States. The schedule of replacements connecting to the staff was set to 1st January 2011 by a Council

[28] O' SULLIVAN, DAVID: The *EEAS, national foreign services and the future of European diplomacy* (2012), available at: http://eeas.europa.eu/speeches/060912_dos_epc_seminar.pdf [cit. 2014-01-04] 3.

[29] BROK, ELMAR: *Prejudices, Challenges and Potential: an Impartial Analysis of the European External Action Service* (2011), available at: http://www.robert-schuman.eu/doc/questions_europe/qe-199-en.pdf [cit. 2012-10-04] 5.

decision.[30] All three personnel segments carry out determined, special tasks and are concerned with their share of relevant agenda.

It emerged as a cardinal question regarding personnel issues that upon which competences will be important to send people to the organisation of EEAS from the Commission, the Council and Member States. Because they expressed their disappointment that Member States' ministry officials would get into EEAS without going through that filter they had to get over in order to fill their position in the European Union. Furthermore, at the dawn of the formation of the organisation, more Member States expressed their fears regarding adequate Member States' representation.[31] Furthermore, later joined Member States mostly feared that earlier joined Member States with greater influence could represent themselves in greater number in the new European diplomatic organisation.[32] Regulation on national and sex ratio also resulted in displeasure with filling up the staff.

Determining the process referring to the selection of EEAS's personnel and the task of working out mobility question were incumbent on the High Representative, and these procedural regulations were laid down in the Council decision. Hence, "recruiting" EEAS' staff was realised based on all these regulations. Among others, for instance the fact that besides the professional experience the principle of geographical and gender-balance was also highlighted, serves to resolve the fears.[33]

Knowing the above mentioned problems and questions, the review presents on the whole a positive picture about the personnel

[30] 2010/421/EU Council Decision, Art. 6-7. Furthermore 2010/421/EU Council Decision, Art. 7. para. (1) and para. (4).

[31] TRAYNER, JAN: *Germany and France dispute Lady Ashton's 'excessive' EU powers* (2011), available at: http://www.guardian.co.uk/world /2010/ feb/28/germany-france-dispute-ashton-european-powers [cit. 2013-10-05].

[32] The EU's new diplomatic service (2010), available at: http://www.euractiv.com/future-eu/eus-new-diplomatic-service-linksdossier-309484 [cit. 2012-09-28].

[33] 2010/427/EU Council Decision, Art. 6. para. (6).

issues of the EEAS. This document lays down that the recruiting of the EEAS' staff which is by now 3 417 people happens in a transparent process in accordance with[34] Article 6 of the Council Decision. This means that the recruiting process based on merits whilst ensuring adequate geographical and gender balance and appropriate substantive representation of Member States in the EEAS. Referring to anxieties of the newly joined Member States (2004), it can be regarded as a positive thing that while at first they were indeed underrepresented regarding personnel joining EEAS from the Commission and the Council's General Secretariat, according to present situation, 12 Member States that joined in 2004 fill in 17.2% of official positions of the establishment plan, and 14% of heads of delegation positions are filled in by citizens from newly joined Member States.[35]

Further cardinal point of the EEAS' personnel issues is to reach gender balance in the service (in the centre in Brussels as well as in EU delegations). Achieving these expectations is the High Representative' strong commitment, however, attracting highly-trained (well qualified) women labour force to senior position raises a problem.[36] Hence, escalating work which aims at improving balance among gender, and taking down possible obstacles that stand in the way of women's professional advancement is formulated as a suggestion. Attempt to achieve balance in the organisation cannot only be seen regarding gender-balanced and adequate geographical representation, as EEAS also aims at decreasing imbalance in the number of positions in the Brussels centre and delegations.

At the formation of the organisation a further problem was that how those cases could be remedied in which such professional knowledge was needed that EEAS only partially had or did not have at all. The solution is obvious: EEAS can apply so called seconded

[34] Ibid.
[35] EEAS Review, 2013, 14.
[36] At present, 18% of full leading positions is occupied by women.

national experts from Member States.[37] Detailed rules regulate on these experts' tasks, period and place of secondment, rights and obligations. EEAS has to ensure the principle of equal treatment among temporary employees coming from Member States and permanent officials (employed for undefined period) in a way that EEAS' whole personnel number's 60 percent must come from permanent officials.

Though, the revision document only mentions EPSO's competitive examination[38] in a short substation, which is hiring equal to entering and is part of EEAS' personnel policy in order to ensure permanent officials' next generation supply. With special regards to EEAS personnel's "varied" combination, EEAS bureaucrats' high level, in the long run common training would be a profitable and welcoming solution – which would need continuous consultation with Member States and various training providers from higher education. As its by-product, even the European identity's strengthening could be expected, as well. The above mentioned suggestion would especially be significant regarding that from July 2013 (besides the European Commission, General Secretariat of the Council and Member States' diplomatic services) other Union institutions' officials have also had the possibility to fill in EEAS positions – taking the above already mentioned selection elements into account.

According to my opinion, from certain aspects EEAS could profit from professionals and officials coming from the two Union institutions and Member States as they supposedly possess the appropriate professional experience which adequate integration could multiply efficient work. Although, there is a threat that diplomats coming from various Member States have difficulties to separate themselves from their own national interests. In order to avoid that

[37] 2012/C 12/04 Decision of the High Representative of the Union for Foreign Affairs and Security Policy (23rd March 2011) on determining rules referring to seconded national professional to European External Action Service.

[38] EPSO: European Personnel Selection Office.

threat, the Council Decision determines in a separate chapter that *"The staff of the EEAS shall carry out their duties and conduct themselves solely with the interests of the Union in mind."*[39] All these expectations guaranteeing that during carrying out the tasks of organization, foreign policy elements coherently formulated by the Member States are realized – hence contributing to the smooth, clear implementation of the EU's foreign policy.

Furthermore, as regards personnel resources, there is a possible chance to develop a real European diplomatic culture. A younger generation building a career in foreign policy, possessing national and at the same time EU diplomatic knowledge will be able to understand practical relevancies of Member States' and the EU's global appearances. And they can later apply in order to serve a European level, a real European diplomatic culture's formation.[40] Furthermore, this could even mean the laying down of a European identity's foundation stone.

3.2. Central administration of the EEAS

The main arrangements on "Brussels diplomatic bureaucracy's directorate" are contained in Article 4 of July 2010 Council Decision. The leadership of the EEAS has plural representation; on the one hand, there are four components in the Members of the EEAS Corporate Board: Executive Secretary General responsible for daily issues, Chief Operating Officer primarily dealing with budgetary and personnel administration, and the two Deputy Secretary-Generals – Deputy Secretary General for Political Affairs and Deputy Secretary General for Inter-institutional Affairs. Furthermore, it includes Managing Directors responsible for unique geographical and thematic spheres of competences, General of the European Union Military Staff, and director of departments of

[39] 2010/421/EU Council Decision, Art. 6. para. (4).

[40] GRAHAM, AVERY: *The EU's External Action Service: new actor on the scene, 2011*. http://epceu.webhosting. be/documents/uploads/pub_1223_the_european_external_action_service_-_new_actor_on_the_scene.pdf [cit. 2013-12-30] 1.

Common Foreign and Security Policy.[41] With the fact that the High Representative could select his "team" himself, the still-evolving structure's efficient operation seems to be proved – hence contributing to the realisation of the EU's coherent foreign action. However, it comes up as a question whether in reality a multi-person leadership like that is required to the service or not. If we take the operation of organisation, its structure's complexity, and the complexity of tasks carried out by it as a base, the leadership's such fragmentation is nearly unquestionable. However, limited budget available for EEAS, furthermore, concentrated supervision of tasks require the logical distribution and dissipation of human resources.

Thus, the High Representative posits in the document on the EEAS revision that in the future it is really unnecessary the parallel holding of positions of Executive Secretary General and Chief Operating Officer. As regarding the streamline operation of the organisation it would be satisfied to merge these two positions in a single post of Secretary General. All these would happen with that the Secretary General still having his/her own right to select the deputy Secretary General him/herself. The established appropriation of decreasing the number of Managing Directors standing at the top of institutions can also be traced in the document. [42] Although, it is true that the rationalisation of EEAS' top leaders' structure is only considered as a medium-term suggestion in the review document on EEAS made by the High Representative.

3.3. Union delegations

Besides central administration in Brussels, EEAS' other main components are the delegations carrying out representation in third-countries and international organisations.[43] At the time of the review the personnel number of the EEAS has already been mentioned (3 147 people), out of which only 1 457 people belong to the centre

[41] Diagram of the EEAS'system. Available at: http://www.eeas.europa.eu/background/docs/organisation_en.pdf [cit. 2014-01-30].
[42] EEAS Review, 2013, 18.
[43] 2010/427/EU Council Decision, Art. 1. para. (4) and Art. 4.

in Brussels, while 1 960 people work at EU delegations. Additionally, about 3 500 Commission employees work at EU delegations.[44] These EU delegations had belonged to the European Commission until the Treaty of Lisbon entered into force. However, in Article 221 para. (2) of the Treaty on Functioning of the European Union says that *"Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy"*. Furthermore, in Article 5 of the 2010 Council Decision of establishing the organisation and functioning of the EEAS, regulations on delegations can also be found. As a consequence of this, during the investigation of delegations, having regard to the efficient and timely implementation of the EU's foreign policy, it is important to note the fact that according to the Council Decision they can get orders from the Commission, the EEAS and the High Representative, as well; which can clearly be regarded as the cost of foreign performance capacity. Hence, as delegations mean such areas where competences overlapping one another can happen occur, it is worth further revising them in the future.

Focusing on the personnel issues of the delegations, the review made by the High Representative drew the attention to the followings in relation to heads[45] of delegations directing the delegations' whole personnel. Following the change of the rotating presidency's role[46]

[44] The Union foreign representation system consists of 139 Union delegations in 163 third-countries and international organisations, which represents that the EU thrives to achieve a completely globally covered system. *See* further: EEAS Review, 2013, 6. and 10-11. At the distribution of personnel among the centre and the delegations imbalance can be explored, this mainly comes from that at the time of filling up the personnel they put more emphasis on the strengthening of delegations. The remedy of this problem in the future will be done by a – a still waiting to be worked out – new rotational and mobilization policy. *See* EEAS Review, 2013, 14.

[45] Most important characteristics of Heads of delegations'. *See* 2010/427/Council Decision, Art. 5. and EEAS Review, 2013, 17.

[46] This is relevant in a way that rotating presidency had significant role in carrying out Union representing tasks in third-countries before the Treaty of Lisbon.

after the Lisbon Treaty, Union delegations took over the role of the rotating presidency in Union representations, hence, the cooperation with Member States has more emphasis, which is shown in regular (at least monthly) meetings on the level of head of delegations. It might be an interesting question that, mainly because of regular operational evaluations and administrative and financial investigations, how much the full defencelessness of the heads of delegations for the High Representative and the Secretary General hardens the effective and smooth coordination of delegations. However, the fragmentation of leaders of delegations would not be successful, either as the fact that orders get to delegations through leaders undoubtedly serves efficient work.[47] Furthermore, regarding Union delegations' personnel issues, it can be a question whether, as the aim is broadening the number of Union delegations to achieve a more extended global coverage in the future, these new delegations' personnel will be realised through newer regroupings, or newer quotas will be distributed for these delegations, supposedly to the disadvantage of other institutions' personnel.

3.4. EU Special Representatives[48]

Finally, the problem of EUSRs cannot be left without attention regarding the personnel issues of EEAS. The Council formed this position in relation to concrete crises and/or situations at times when back then EU delegations belonged to the Commission, but instead of delegations, they mainly stood in strong connection with Member States with the intermediation of Political and Security Committee. However, with the Treaty of Lisbon, the system of 139 Union delegations fell[49] under the direction of the High Representative; hence, EUSRs (at present 12) form indispensable parts of EEAS.[50] As for the future, EUSRs whole integration into EEAS is formulated as a suggestion in such a way so that at the same time their strong

[47] EEAS Review, 2013, 15-19.
[48] Hereinafter: EUSRs.
[49] Art. 221. TFEU.
[50] Art. 33. TEU.

connection with Member States remains. According to a further short-term suggestion in connection with reviewing of the EUSRs' role it is also formed: *"Review EUSR mandates and role, to closer integrate them into EEAS structures. Revisit the Council guidelines on the appointment, mandate and financing of EUSRs."* There is another suggestion among medium-term recommendations which says the creating a shared services centre to provide logistical, procurement and administrative support for all Common Security and Defence Policy (CSDP) missions and EUSRs.[51]

4. FINAL THOUGHTS

The European External Action Service has proved in its nearly three-year existence that as the EU's new diplomatic organisation it brought a positive shift towards realising the EU's more unified and more efficient foreign action. It can be said that it plays a central role in that the EU can ensure its most efficient performance in questions requiring global cooperation. This is confirmed by the document proposed by the High Representative of the Union for Foreign Affairs and Security Policy in July 2013, which provides an overall picture on the system and operation of the EEAS so far, and forms short- and mid-term suggestions for the future regarding the system and operation of the organisation. However, current study primarily emphasises the human resources policy of the service based on and in the light of the EEAS Review. It looks back to personnel issues, one of the cardinal segments encompassing the formation of the service, then it elaborates on and reveals how personnel questions creating problems at the formation of the organisation have been solved and what kind of suggestions shall serve as solutions for problems connected to human resources in the future. The current revision document perfectly represents that scrupulously worked-out and realised human resource policy has far from negligible significance, especially, if it regards an apparatus of thousands. As

[51] EEAS Review, 2013, 5, 16, and 18.

with a well-organised and coordinated bureaucratic apparatus, EEAS could have much more efficient operation than before. Furthermore, the High Representative's revision document is a perfect rehearsal for the Organisation's total reformation in 2014, to such an extent that at that time the High Representative will have to come out with reform suggestions regarding the whole Council Decision on the organization and operation of the EEAS.[52]

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Laura HEGEDŰS

A New Opportunity in Alternative Advertising – Product Placement in Hungarian Media Law

1. INTRODUCTION

The meaning of the word 'media' is quite widespread nowadays. Earlier we could associate it with television, radio, the press, but in this century it is impossible to give a correct definition of the word 'media'. Thanks to the rapid improvement of technology it has further meanings. On the one hand, it means mass media and platforms but on the other hand, it means the institutions that manage them. Because of this massive improvement in every field of the media, law had to be refreshed in order to be effective. The results of the legislation were two new acts in the field of media law. These are Act CLXXXV of 2010 on Media Services and Mass Media and Act CIV of 2010 on Freedom of the Press and Fundamental Rules of Media Content. This is also known as "the Media Constitution". Effective regulation on this field is essential. Media is different from any other kind of service. It is used for creating cohesion in the society. It helps to settle battles between members of the community and to spread national and international culture.[1] We cannot talk about it as a unified, integrated law or codex because the regulation includes constitutional, criminal, civil and administrative elements, too. The media law is a quasi branch of law because it is a complex, heterogene field that changes quickly.

[1] KOLTAY, ANDRÁS – NYAKAS, LEVENTE (ed.): *A magyar és európai médiajog* [The Hungarian and the European Media Law], 2012, Complex Kiadó, Budapest, 32.

In this short essay, I am going to write about commercials, their effect on people, but mostly about a newly integrated improvement called 'product placement'.

A wider category is called 'embedded advertising' in legal literature. However, in order to be punctual, I have to emphasize that there are two different parts: product placement and product integration. The first one is a visual or sounding reference of a product, brand or service, while integration means when it is really integrated into the programme.[2] As far as I am concerned, these two types are not separated in everyday life. Embedded advertising mostly appears in movies and series but nowadays it is not so strange if we meet this type of advertising in music clips, novels or computer games.

Consumers today experience more advertising messages than they experienced at any other times in history. This phenomenon is known as "ad creep".[3] It is normal that people are not patient and disrelish commercials, so advertisers and advertising messages have to change policy. Facilities of modern technology make it possible to record programmes and play them later. That time it is easy to leave commercials out. And I have not mentioned online sites – where movies can be watched without interruption –, or downloading, so far. In the case of commercial channels income from advertisers means almost everything for them in order to exist. They need to find a compromise. That is why product placement came to mind.

Erwin Ephron says that the paradox of product placement is: If you notice it, it is bad, but if you don't, it is worthless. The essence of product placement can be found in this short sentence. It should not be ostentatious but surely it has no sense if nobody recognizes it. Gabor Fabricius, creative chief of Republic of Art agency has a humorous thesis about good product placement. He says that good

[2] FUJAWA, JENNIFER: FCC's Sponsorship Identification Rules. Ineffective Regulation of Embedded Advertising in Today's Media, in *Federal Communications Law Journal*, Vol. 64. Issue 3. (2012) 551.

[3] SAID, ZAHR: Embedded Advertising and the Venture Consumer, in *North Carolina Law Review*, Vol. 89. Issue 1. (2010) 115.

product placement is when you feel the product; logo etc. is only accidentally there but you – the viewer – are so clever and skillful to notice that, for instance, they use Nokia.[4]

Product placement in Hungary is a new implementation that is why I picked this topic for this article. When I started the examination more phenomena could have been noticed. Firstly, in my opinion, the number of warning signs was sometimes massively increased without any real product placement. This led me to the question: how strict our regulation is regarding this topic? Moreover, I would have liked to separate two really similar subjects which are product placement and sponsorship. In my opinion, this could be the reason of unnecessary warning signs because media services are more careful instead of being forced to pay fines.

At first, I am going to mention Hungarian regulation including European Union suggestions and at the end I am going to give some details about the new co-regulation system that our country applies.

2. PRODUCT PLACEMENT IN THE LEGAL SYSTEM

At first, the Union chose the policy to let national laws create their own regulation. However, because of technical improvement it changed its mind. Today, it has a balancing regulation suggestion; advertisers, media services and firms were taken into consideration.

Audiovisual Media Services (AMS) Directive of European Parliament and Council on 10th March 2010 suggested member states to provide audiovisual media in their country. This Directive aims at producing a framework for cross-border audiovisual media services in order to strengthen internal programme production and distribution market and to guarantee conditions of fair competition. The Directive gives a certain definition of product placement under

[4] PAPP-VÁRY, ÁRPÁD: *Product placement Reklám a filmekben, számítógépes játékokban és a szórakoztatóipar más területein* [Product Placement – Advertising in Movies, Computer Games and Other Areas of the Entertainment Business], 2008, Századvég BKF, Budapest, 42.

point 'm'. It means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, service or trade mark which is featured within a programme, in return for payment or similar consideration.[5] It should be allowed under certain circumstances, unless a Member State decides otherwise. However, where product placement is surreptitious it should be prohibited. The principle of separation should not prevent the use of new advertising techniques. The definition of product placement laid down in this Directive should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or a trade mark which is featured within a programme in return of payment or similar consideration. Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme, on the basis of a positive list.

3. MEDIA LEGISLATION IN HUNGARY

As I have mentioned it before, product placement has only been an element of the legal system since 2010. Act CLXXXV of 2010 on Media Services and Mass Media includes and regulates this. Earlier, it was not equal to the suggestions of the EU because it was only allowed for example in fictional movies, however, it was mostly banned.[6] The complete ban resulted in a chaotic situation so the former Media Authority (ORTT) allowed product placement in some cases in its Resolution nr. 258/1997 (XI. 5.).[7] According to a survey

[5] The Audiovisual Media Services (AMS) Directive of European Parliament and of the Council of 10 March 2010.
[6] Act I of 1996 on Radio and Television Broadcasting Art. 10. para. (5).
[7] Art. 2. point a) Product placement is allowed only in fictional movies, free and only until it is lifelike.

from 86 advertising firms, 30% ordered product placement before the new regulation and 70% was clearly aware of the illegal act.[8]

It is risky that some provisions of the Directive are applied to online media content too, which can negatively affect sponsorship.[9] The two directors of commercial TVs in Hungary agreed with the decision of the new regulation. It was necessary to do this in order to keep balance between them because if it broke, Hungarian media would collapse.[10]

Act CLXXXV of 2010 on Media Services and Mass Media specialize the regulation in Art. 30-31.

3.1. Permission or prohibition

Product placement is prohibited. By way of derogation from the first sentence, product placement can be admissible in the following cases: in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes or where there is no payment but the provision of certain goods or services is free of charge such as

[8] For the exact diagram: N. N: Látja? Nem látja? Na látja!: Tabutéma a product placement [Do You See? Don't You See? You See! The Product Placement as a tabu], in *Kreatív: marketingkommunikációs szaklap*, Vol. 12. No. 3. (2003) 19.

[9] POLYÁK, GÁBOR: A médiapiac szabályozása az új médiatörvényben [The Regulation of the Media Market in the New Media Act], in *Médiakutató Jog rovat*, 2011 Spring http://mediakutato.hu/cikk/2011_01_tavasz/03_mediapiac_szabalyozasai/01.html?q=term%C3%A9kelhelyez%C3%A9s#term%C3%A9kelhelyez%C3%A9s [cit. 2013-11-27].

[10] LAMPÉ, ÁGNES: Médiaszabályozás: pró és kontra Simon Éva, Széky János, Hanák András, Polyák Gábor, Koltay András, Nyakas Levente és Lapsánszky András a 2010-es médiatörvény-csomagról [Media Regulation Pro and Con. Éva Simon, János Széky, András, Hanák, Gábor Polyák, András Koltay, Levente Nyakas and András Lapsánszky about the Media Act Package], in *Médiakutató Jog rovat,* No. 4. (2011). Available at: http://mediakutato.hu/cikk/2011_04_tel/01_mediaszabalyozas/01.html?q=term%C3%A9kelhelyez%C3%A9s#term%C3%A9kelhelyez%C3%A9s [cit. 2013-11-27].

production props and prizes, with a view to their inclusion in a programme. As for the first case, it is not allowed in children's programmes. The Act does not explain what light entertainment programmes are but in my opinion a taxative enumeration would be impossible. There are special requirements that programmes have to meet, like their content and, in the case of television broadcasting, their scheduling must in no circumstance be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; they must not directly encourage the purchase or rental of goods or services, viewers have to be clearly informed about the existence of product placement. Programmes containing product placement must appropriately be identified at the beginning and the end of the programme, and when a programme resumes after an advertising break, too, in order to avoid any confusion on the part of the viewer. By way of exception, it can be left out if the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

It is restricted to use product placement in news, political programees, especially programmes for minors under the age of 14, religious or ecclestic or reports on national celebrations, or official events. In any event, programmes must not contain product placement of: tobacco products, cigarettes or product placement from undertakings whose principal activity is manufacturing or selling of cigarettes and other tobacco products; specific medicinal products or medical treatments available only on prescription, any gambling services for which a state tax authority's permission is needed, and products that may not be advertised pursuant to this Act or other pieces of legislation.

National Media and Infocommunications Authority and the Media Council approved a recommendation about further rules which helps to understand the Act and its regulations.[11] It is contained in this chart, which helps to understand where the use of product placement is allowed:

PROGRAMME TYPE	PRODUCT PLACEMENT AGAINST PAYMENT OR CONSIDERATION IN EXCESS OF THE PROVISION OF THE PRODUCT TO BE PRESENTED (cases 1. and 2.1)	PRODUCT PLACEMENT AGAINST THE PROVISION OF THE PRODUCT ITSELF FREE OF CHARGE (case 2.2)
News programmes	**no**	**no**
Political information programmes	**no**	**no**
Programmes reporting on the official events of national holidays	**no**	**no**
Programmes with religious or ecclesiastical content	**no**	**no**
Programmes intended specifically for minors under the age of fourteen	**no**	**yes**
Cinematographic works (cinema and TV)	**yes**	**yes**
Film series (TV)	**yes**	**yes**
Sports programmes	**yes**	**yes**
Entertainment programmes	**yes**	**yes**
Other programmes (with the exception of Paragraph (3) of Article 30 of the Media Act)	**no**	**yes**

1. Schedule.

[11] Available at: http://mediatorveny.hu/dokumentum/557/product_placement_Rec_EN_130111.pdf [cit. 2013-11-27].

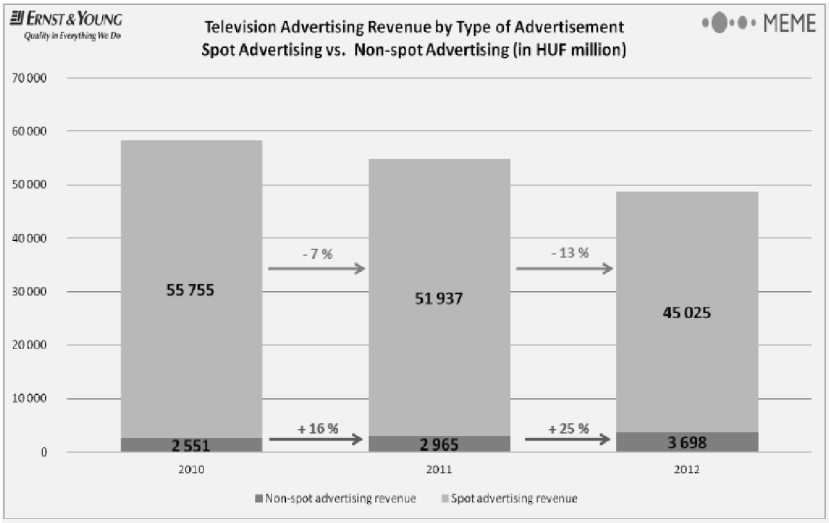
4. CO-REGULATION

The co-regulation system of the Media Act provides an opportunity for self-regulatory organizations to participate in the arrangement of cases falling under the competence of the Media Council. It is based on the principle of subsidiarity. Self regulation was a basic but existed field in the media sector, however, the Authority wanted to improve it. This, compared to other types of self-regulations found in other sectors and administrative areas (e.g. alternative dispute resolution procedures such as conciliation or mediation) is a stronger – the strongest possible and still constitutional – authorization. In order to achieve the best results, the Authority cooperates with media providers, subsidiary media service providers, publishers, broadcasters, intermediary service organizations, and professional self-regulation of alternative dispute resolving forums. In my opinion, it is a really good decision. It helps to solve problems together and the Authority has less burden.

The tasks were split between four professional self-regulating organizations: *Önszabályozó Reklámtestület* (ÖRT), *Magyar Lapkiadók Egyesülete* (MLE), *Magyarországi Tartalomszolgáltatók Egyesülete* (MTE), és a *Magyar Elektronikus Műsorszolgáltatók Egyesülete* (MEME).

The supervision of the effective and fair use of product placement is the task of MEME.

They signed an administrative contract and there is a codex which details the rules of supervision and processes. This organization does advertising revenue surveys every year. The subject of 2012 was product placement. The diagram below shows that incomes from commercials have a decreasing tendency year by year, but in this situation, the number of product placement increases.



1. Figure: Television advertising revenue by type of advertisement.[12]

4.1. Magyar Elektronikus Műsorszolgáltatók Egyesülete[13]

In this article MEME is important because its task is to supervise product placement. Purposes of the organization include developing ethics and professionalism in work. Its main task is to consult and make recommendations in order to take part in legislation and economic decisions, reviews and revision. Moreover, it has been doing surveys since 2005 under the name of Reklámtorta (Commercial Cake). Once or twice a year a slice of interesting information is published with researches and surveys.[14]

From March of 2012, the head of the organization has been Krisztián Kovács. Member can be any public or commercial

[12] *See* http://www.memeinfo.hu/system/files/attachments/reklamtorta_2012_2_28_eng_final_v3.pdf [cit. 2013-11-27].

[13] MEME's Basic Code of Rules. Available at: www.memeinfo.hu/system/files/alapszabaly_alairt.pdf [cit. 2013-11-27].

[14] MEME posts the results of its surveys every year under this name.

television or radio, or a person who is related to the field of media and accepts behavior charter as obligatory.[15] Membership is voluntary and starts by submitting a written acception. Media Authority provides them money to cover co-regulative process. It consist one normative and other special allowance.[16]

4.1.1. The contract

It was signed by Levente B. Málnay (MEME) and Annamária Szalai (Media Council) on 20th July 2011. The original contract was amended on 19th September 2012. Its legacy is based on the Behaviour Conduct. The self-regulatory body is not be deemed as an administrative authority, or a subject of the system of public administration under this authorization.

The authorization covers the handling of individual cases related to undertakings under the scope of the Code, the settlement of disagreements and legal disputes – involving the scope of the authorization – between undertakings under the scope of the Code, and the supervision of the operation and conduct of undertakings under the scope of the Code in relation to the authorization. Under the administrative contract, Media Council and the self-regulatory body can agree on joint performance of tasks and implementing principles of activity and service development, programmes of public concern not regulated in legislation but closely linked to media administration and media policy, and any other objectives related to the media. MEME's authorization includes exercising supervision regarding compliance with Articles 14-19 and some parts of Article 20 of Press Freedom Act, or any of those provisions in relation to online press products or on-demand media services.

[15] For members of the organisation, *see* http://www.memeinfo.hu/tagjaink [cit. 2013-11-27].

[16] For exact prices and support, *see* http://mediatanacs.hu/dokumentum/153678/meme_szerzodes_egyseges_szerkezet_120912.pdf [cit. 2013-11-27].

4.1.2. Code of Conduct[17]

It details the parts of authorization and product placement settled in Article 15.

The rules are balanced with the media Act. It informs us about the deliberation e.x. the impact of acts and processes that should be taken into consideration. Moreover, society and people's reputation is also important.

The second part of the Code contains the details of the regulatory process. If acts of the Code are broken a 3-member-comitee is formed to analyze the situation. One of them is a legal expert. Two types of committees can be formed: case by case or permanent. The procedure can be started upon request or after a special supervision ex officio. It is not public and charges have to be paid in order to get it started. The person whose rights or legitimate interests are compromised by the media content can turn to the media service provider and give in his/her request within 30 days. If the request is rejected or left without an answer co-regulation can be requested within 15 days.

Possible consequences of the procedures:

1. If the request of the first instance is punctual, the co-regulation organization can call the media service provider to make an agreement with the requester within 3 days. If not, it has 3 days to make its defense, collect and submit its evidences.
2. If the provider changes or erases the questioned content, moreover, promises not to continue that behavior, the organization cancels the procedure.
3. The decision can contain the consequences below:
    a) if it is needed, the organization makes the provider change or stop its behavior and demands in integrum restitution;

[17] *See* http://mediatanacs.hu/dokumentum/153678/meme_szerzodes_egyseges_szerkezet_120912.pdf [cit. 2013-11-27].

b) the organization can make the provider to give compensation equal to the law breaking e.x. that the compensation shall be public;
c) the provider can be forced to provide non-material compensation, the payment of the procedure charges, or other expenses;
d) it can withdraw the right to be connected to the organization during other procedure for a certain time – in that case it will be under the supervision of the Media Authority.

The committee can apply more consequences from the above mentioned. 15 days are provided for the possible remedy. The Media Council's supervision can be required.

5. BLURRED LINES AND DE LEGE FERENDA SUGGESTIONS

In this chapter I will try to clear the blurred line regarding regulations. Some definitions are really similar but mean different things. It is easy to mix them because the differences are not well-stated.

In Article 1 of Chapter 1 of the AMS Directive we can find sponsorship among the Definitions. It means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promote their name, trade mark, image, activities or products. In my opinion, there are two main differences to show which are not clear enough. The first one is the purpose of money, the payment. In case of product placement, the purpose is to have the product appear in the movie, series etc. On the other hand, in the case of sponsorship, they sponsor the whole Programme or movie in order to provide promotional service. The other difference is the result of the impact and how they try to achieve it. When we speak about product placement, the brand, the product is integrated into the programme, into the plot, while if it is sponsorship, it can be

shown during the programme but never as a part of it. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of the programme. In contrast, sponsor references may be shown during a programme but are not part of the plot.

The division of editor work and commercial can be felt in the case of sponsorship, while product placement is not so strict in that case. It has its own rules; it cannot be regulated as other sideway commercial types.

Naturally, it cannot be said that these two institutions exist without the other. They both can appear in the same programme even with the same product. In Hungary, sponsorship and product placement is allowed together even if the sponsor and the product placer is the same person, firm; and the product, brand, service or logo is the same. In France, there are stricter rules in this case so the sponsored product cannot be shown as product placement in the same programme.

As far as I am concerned, the most contentious part of this topic is the difference between product placement and surreptitious commercial communication. The line is really thin and now, when product placement is legally allowed it is easy to make mistakes. Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content in Article 20 states that no surreptitious commercial communication may be published in media content. It happens when product placement has bigger emphasis than it is needed. According to the Recommendation of the Media Council, programmes containing product placement may not call for the purchase or rental of a product or the use of a service in direct manner. Such a "direct call" is any – verbal or visual – intentional and clear appeal to purchase, promote or use the product or service that is the subject of product placement, especially, the communication of the following information in the programme:

1. publication of commercial availability and price of the product/service;
2. communication of properties/advantages of the product/service;

3. publication of slogan of the product/service;
4. mentioning of statements from the product/service's advertisement.

Programmes containing product placement may not give any unjustified emphasis for the product so displayed which, otherwise, does not stem from the content of the programme flow.

Undeniably, there are common roots with surreptitious advertising, however, it cannot be said that product placement is a surreptitious advertising with a warning call. My questions were clarified at the end of my research and a survey conducted in commercial channels proved that there are many unnecessary precaution warnings without real product placement. I believe that the main problem is the lack of information. People are not informed enough about the laws and opportunities. Detailed and systematic information should be provided for people to work effectively because without this the innovative plan of co-regulation will not work. It also might be possible that the co-regulatory system – which has not been built up in practice overseas – would be given more room, the self-regulatory framework would be provided by the law, but the content could be created by those organizations. The self-regulatory organizations are intended to serve utility and involve substantial deregulation.

6. CONCLUSIONS

All in all, product placement is much more popular among producers because its effectiveness is better than that of traditional commercials'. Because viewers meet products which they choose, it is much more likely to accept the commercial and the impression will be favorable.[18] With the alternative ways of media consumption (e.x. DVR) making new ways, product placements will inevitably

[18] BEASLEY, ROBERT C.: Royalty Free Permissions for Use of Licensed Products in TV or Movie Productions, in *Licensing Journal*, Vol. 2. Issue 5 (2006) 37.

grow because of their "win win win" nature across relevant industries. As Jay May, founder of Feature This! suggested, the production of a show or movie (or video game) wins because it gets brands for free and can greatly reduce production budgets. Clients win because of the relatively inexpensive branding of their product (and in some cases, to a very targeted audience [i.e., teen movies]), and product placement agency wins as they get paid for bringing the parties together.[19]

According to the survey of Sonda Ipsos Zrt., 17% of Hungarian viewers see brand products every day and the typical age is between 20-29. It was made in 2011 so I am sure that the numbers are even higher now.

Scott Donaton, a U.S. marketing communications magazine's columnist drew attention to the fact that beside product placement, there are still other options for advertising to survive. For example BMW's short film series combine the content and the brand. In the 20-minute "mini-cinemas" the company's directors hired famous people to promote brands. The innovative solution was not left without success; at the International Advertising Festival in Cannes they got a Titanium Lion prize.[20] We can state that Hungarian regulation is in an extremely early stage of development and there is a long way ahead of us that began in 2011.

Finally, I want to mention an American movie entitled the Joneses.[21] It is about a family who moves into a high income suburb under the pretense of being a typical family who lives the American dream. In reality, Kate is the leader of a team of stealth marketers, professional salespeople who disguise product placement as a daily routine. Their clothing, accessories, furniture, and even food are

[19] LA FERLE, CARRIE – EDWARDS, STEVEN M.: Product Placement. How Brands Appear on Television, in *Journal of Advertising*, Vol. 35, No. 4 (2006) 84.

[20] MÁRK, SZONJA: Unalmas product placement [Boring Product Placement], in *Kreatív: marketingkommunikációs szaklap*, Vol. 14. No. 4. (2005) 8.

[21] *See* http://www.imdb.com/media/rm3528560384/tt1285309 [cit. 2013-11-27].

carefully planned and stocked by various companies to create visibility in a desirable consumer market. The movie is a double twist; there are double embedded advertisings while in such a story it is impossible to leave products out. Is this just irony and caricature of the present situation or do advertisers' rule the media in reality?

I will leave this question open because it really makes us think. We can conclude that commercials will never vanish, just transform and adapt to the new inventions.

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[7] N.N: Látja? Nem látja? Na látja!: Tabutéma a product placement [Do You See? Don't You See? You See! The Product Placement as a tabu] in *Kreatív: marketingkommunikációs szaklap*, Vol. 12. No. 3. (2003).
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István HORVÁTH

Bitcoin's Role and Position in Financial Relations of the 21st Century

"*Wealth is not important, only independence is.*"
André Kostolany

1. INTRODUCTION

The use of Bitcoin as currency, – even in this early stage – is some kind of pioneer behavior. It only happens because this kind of civil initiation has officially been recognized and has an exchange rate to USD. But does official recognition matter? Is it needed for the new currency to work or is it some kind of disadvantage for the creators of this type of money?

Is the state putting out his "well-wisher" influence to make the entry into business easier or to create a new source of income? I am looking for an answer to the following question: Can we bypass the state in money creation and if we can for how long can we do this? What can be the effects of the rise of Bitcoin?

"As self-professed »digital skeptic« David Golumbia explains, Bitcoin is more accurately understood as an ideology than as »cash for the internet,« another conceptual shortcut offered by proponents."[1]

[1] *Bitcoin: The Cryptopolitics of Cryptocurrencies*, Harvard University Press Blog. Available at: http://harvardpress.typepad.com/hup_publicity/2014/02/bitcoin-the-cryptopolitics-of-cryptocurrencies-david-golumbia.html [cit. 2014-02-28].

2. POSSIBLE CAUSES OF NON-STATE MONETARY EMISSION

In Hungary, only The Central Bank of Hungary has the right to issue currency and every other country has his/her own institutes ruled by the law. Yet, citizens try to find other ways to issue money or be more independent, which appears more and more in this economic situation.

2.1. Independent currencies – Economic stimulance or independence?

"The bigger part of money is not issued by the State. The previous hypothesis was only true for cash. The much larger amount of money on bank accounts is the key to the problem. It makes inflation but it does not appear on the revenue side of the budget, it does not decrease taxes. This one, the 5% reserve ratio is a great magic trick, it is the »money multiplier«. It was found out for delusion. It seems that emission is in the hands of the State but – as numbers show – it does not help the budget, only private parties."[2]

This process led to the emergence of today's crisis. Since there are no reserves behind money, no warrants, if the system collapses there will be no one to be asked and no one to stand in the gap. Of course – as a last resort – the state is there but may the state be held responsible for wealth which was not created by him/her.

It is a bit like the owners' responsibility in Hungarian civil relations. If the tenant causes damage to a third person, the owner can be sued because of the interest of the third party. And how internal relationship is held by the owner and the tenant is unimportant for outside observers. But is this approach good on global scale? I cannot answer this but in my opinion, the interpolation process does not result in automatic usability. In fact, the current economic situation seems to confirm that this is a destructive effect on global palette.

[2] Available at: http://rrr100.wikispaces.com/MaganPenzkibocsatas [cit. 2013-11-10].

2.2. Is absolute privilege of issuing money needed?

The State's opinion is certainly yes. This is supported by the fact that the U.S. government, in addition to pushing against online piracy, immediately went face to face with Bitcoin. The argument is: it is an untraceable type of money which is not issued under the State's control and can easily become a black market currency and the tool of money laundering. In addition, some U.S. senators said that if Bitcoin would reach a critical mass, it could jeopardize the authority of the government.

The initiative does not seem to be able to be successive but it already has an example of the U.S. government shutting down a quasi-money called E-Gold.[3]

3. WHAT MAKES MONEY?

"Money appears in very different forms in various ages and takes countless shapes in these times because of the symbolic and social relations by its essence, which is defined by the era and financial conditions in a frame. Without social community, there is no money. Anybody can experience it when one gets to a country where Hungarian currency is not recognized or not recognized as a vain attempt to carry out transactions – Forint banknotes are only a piece of coloured paper. In contrast, we can use an internationally recognized credit card to purchase goods and services."[4]

An object or symbol that performs functions defined within the community can be considered as money. The common division of these functions are:

1. value measurement;
2. traffic tool;

[3] CHEREDAR, TOM: *Forget piracy, U.S. government is going after Bitcoin.* Available at: http://venturebeat.com/2011/06/08/government-crackdown-on-bitcoin/ [cit. 2013-11-10].

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3. tool of payment;
4. accumulation (savings, treasure) tool.

The State can only consider "money" as currency if each of these four functions is completely satisfied. There may be, however, a species of money, cash equivalents and quasi-money, which can fulfill certain tasks but not others. Hungarian Forint – although, all four functions are completely performed within our borders – internationally no longer serves everywhere as money by definition.

"As an economist puts it, »In post-Keynesian monetary theory money is anything that will settle a legal contractual obligation. And by the civil law of contracts, the government determines what settles a legal monetary contractual obligation.« This is the fundamental point, critical to all monetary theory, that Bitcoin advocates seem unable or unwilling to recognize (and admittedly it is what was until now a fairly arcane point of economic theory): the State decides what money is, and no assertion otherwise by individuals or groups can change that – only the law can."[5]

3.1. Currency Substitution

There are hundreds of communities around the world whose members are only affected by a limited extent of inflation. They do not use money but also run an extensive service exchange system.

The more narrowly interpreted "classical barter" is a trade exchange: exchange of goods is not related to money, exchange is a simple naturalistic transaction. Goods are usually only associated with quantities: one trader sells a specified quantity of goods to another trader and it accepts goods in exchange, as well. The transaction type is named after the English word around the world.[6]

The system worked out by a personal trainer in Canada in the early 1980s. The Scottish born Michael Linton found that although some people would have offered assistance works for him, if the person just had not wanted to be trained, he would have been unable

[5] CHEREDAR: *op cit.*

[6] TÖRZSÖK ÉVA: *Barterügylet: Üzlet pénz nélkül?* [Barter Agreement? Business without Money?], 1993, KJK-KERSZÖV Jogi és Üzleti Kiadó, Budapest, 92.

to offset. He thought that if he takes a bigger community as a base and includes a wide range of services, sooner or later he would have somewhere to place his service. He should not have to "repay" the same person who provided assistance but through the cycle, we all win. Not to mention the fact that these are not only professions that come to mind but for example coaching, car repair, child care, letter writing and painting, as well. Who knows what else may be needed. Linton called his invention Local Exchange and Trading System (LETS).

LETS networks use interest-free local credits, so direct swaps are not needed to be made. For instance, a member may earn credit by doing childcare (as said) for one person and spend it later on carpentry with another person in the same network. In LETS, unlike other local currencies, no script is issued, rather transactions are recorded in a central location open to all members. As credit is issued by the network members for the benefit of the members themselves, LETS is considered to be a mutual credit system. Hence, no real money is involved, a unit of account, however, must be used. This virtual money – which is just information, a credit on the account of members –has a variety of names around the world. Canada seems to stick to the local money they call Calgary or Toronto –which is dollar, in Bath, Great Britain, however, it is called Oliver. In Bristol it is called "Thanks", and the largest LETS organization that works with thousands of members in Sidney uses the name "Eco".

Since the eighties, there has been a modified version, called time. The British and the Americans use it and call it "Time Money" or "Hours". In the UK 80 time banks operate, in the United States 250 organizations like this are held accountable. The initial "favour banks" first spread in the southern neighbour of Canada, then quickly New Zealand and Australia and it reached Europe, as well. Only Netherlands has 100 "favour banks".

Most of the quasi money is actually invisible or is only a credit, in some places, however, a note was drawn.

The amount of these local currencies should not be regulated from outside because just as much favour money is created as much

is needed. No interest and no inflation affects is, except if local money is bounded to the State currency.

Community strengthening by currency substitution:

1. Actually, not replacing but complementing the currency, however, it works in times of recession and high unemployment, too.
2. Character and self-improvement – it seems that community needs us.
3. It encourages responsibility as business partners are members of a community.
4. It is built on local needs.
5. The community develops skills, resources, community strength.[7]

3.2. Quasi money in Hungary

Today's economic life has been declining and further decline is projected. This case made a difficult position for small and medium enterprises and private individuals. In the current economic situation, businesses and individuals have to operate with relatively high prices and with less availability from the right amount of medium of exchange (quasi money).

The use of quasi money in the market increases the amount of free exchange (operators are replacing their working capital with money substitutes to transact some of their accounts with each other, and working capital tied as deposit increases financial institutions' lending capacity), this may improve the liquidity position of businesses, hence, demands and satisfaction of needs and capacity utilization can be achieved at a higher level, and with this result more local services and trade scan come off.

The initiatives that were recently launched in Hungary in order to vivify local currencies and community life use different routes but have similar difficulties.[8]

[7] *Szívességbankok* [Favour Banks]. Available at: http://www.slideshare .net/helyipenzek/szvessgbankok-intzmnyestett-kalka-8559607 [cit. 2013-11-08] 4.

3.2.1. "Kékfrank"

Money: a measure of value, payroll and a store of value. And a bogeyman as well, causing all the wrong things. Of course, not money in itself is the problem but anomalies and features resulted from the incompatibility of the compound money's characteristics. After all, if you withdraw it from the market, it cannot be a medium. However, money is needed, no one can dispute its role in economic life, only its functions need to be revaluated.[9]

This has recently been made by the "*Ha-Mi-Összefogunk Európai Szövetkezet*", which issued "*Kékfrank*" voucher. The new kind of cash equivalent was introduced in the districts of Sopron and its vicinity in the cross-border as well, with the aim of revitalizing the economy.

"*Kékfrank*" is a quasi-money but can be regarded as local. "*Kékrank*" voucher allows payoff among the members of the civil law partnership without the official currency (HUF), and the inventor hopes that it will move the economy.

3.2.2. "Pilisi korona"

"*Pilisi korona*" is a virtual exchange tool related to Piliscsaba and its surrounding area, which proceeds through a local association but membership is not a prerequisite to become a service provider in the "exchange club" network ran by the organization. The system basically consists of individuals, and exchange funds – products and services available for "pilisi korona" – are also out of this circle. 200-250 people are currently in the system, however, it is true that not everyone is active. "Pilisi korona"-s turnover is a storage facility

[8] *Helyi piac, közösségi értékteremtés – működik az érme* [Local Market, Communal Value Creation – the Coin is Working]. Available at: http://www.gondola.hu/cikkek/68252 [cit. 2013-11-10].

[9] ZAGYVA, GABRIELLA: *Kékfrank*. Available at: http://humusz.hu/kukabuvar/kekfrank [cit. 2013-11-10].

which directly connects the swap of the voucher to the exchange of objects and services.[10]

3.2.3. "ÉrMe-bankó"

"ÉrMe-bankó" is not money, it is only a discount ticket. Companies belonging to the "ÉrMe" business networks – which is considered as reliable and honest by the organization –received the "ÉrMe-bankó accepter place" status, they undertook to give (at least) 10 percent discount from products and services paid with the ticket.Tickets were printed in groups of 10, their value equals to 10 euros (or approximately three thousand HUF). This means that the ticket can be effectively used if the value of the purchase is at least 30 thousand Forints (HUF). This is not a problem because most of the tickets are used by firms in business-to-business relations. Primarily, companies acquire it themselves (for 50 thousand HUF annual registration fee) but an amount is given to wider circle of "ÉrMe club" members as well, and as payment for volunteers. Now, the first year of implementation is beyond the coins, while the network has printed about half of the 100 thousand bills.[11]

3.2.4. "Balatoni Korona"

The Balaton regions' money substitute ticket was released in 22nd March 2012 by Tibor Navracsics, Deputy Prime Minister, Minister of Public Administration and Justice.

"Balatoni Korona" is the first system that works with majority government involvement. The issuer of the voucher is "Balatoni Korona" Ltd., which consists of seven municipalities: Veszprém, Várpalota, Balatonfüred, Balatonalmádi, Litér, Tihany and Nemesvámos together with County Chamber of Industry and Kinizsi Bank.

The local currency is designed to boost the economy in the region, plus, it is a source of liquidity to ensure financial market

[10] *Helyi piac, közösségi értékteremtés – működik az érme* [Local Market, Communal Value Creation – the Coin is Working]. Available at: http:// www. gondola.hu/cikkek/68252 [cit. 2013-11-10].
[11] *Ibid.*

participants. It is planned that within one – one and half years, there are going to be about three hundred locations in the region where they will have to accept the payment with "Balatoni Korona".[12]

4. BITCOIN

4.1. Definition, BitCoin Mining

As we have seen before, we cannot count the number of alternative financial systems, virtual currencies or digital cash.[13]

Bitcoin system's mode of operation is unique compared to direct competitors and has reached a critical mass, when we need to deal with it. Uniqueness is because of what, for the first time, it is worth considering what differentiates it from any other digital currencies:

1. There is no one behind it: no multinational companies, well-known banks, not even a country. It is an independent, open, decentralized international system.
2. It is well documented, transparent, it has a public protocol, its client software is an open source, its database is distributed and the connection to the system is peer-to-peer.
3. Those are not the individual transactions which are confidential but the true identity of users. Instead of names and account numbers, here we only find long, nonsensical addresses composed of numbers, which can vary by transaction. Users can hardly be traceable or can be even completely anonymous within the system.
4. Bitcoins (as known as BTC) may be obtained in several other ways as well:
    a) We can provide a service if we sell a product for BTC.

[12] *Bevezették a Balatoni Korona utalványt* [The Balaton Korona Bill has established]. Available at: http://www.metropol.hu/gazdasag/cikk/863118 [cit. 2013-11-10].

[13] Flattr, metacurrency, Open Bank Project, Ripple, virtual currencies of video games (most well known is the Second Life's Linden Dollar), and the PayPal.

b) We can buy BitCoin for dollar, euro or pound from one of the international retailers (e.g. Hill Trade, Britcoin, MtGox).
c) We can "mine" Bitcoin either individually or in association with others if we have an appropriate hardware and can pay the electricity bill.[14]

"A number of people have tried to identify the creator of Bitcoin – so far without success. Satoshi Nakamoto, after having published the foundations of a revolutionary electronic transaction management system in mid-2010, disappeared from the Internet. His published writings including typical British and distinctively American formulations of words, so many people suspect that behind the pseudonym there is actually a group of mathematicians, hackers and programmers."[15] The system was found out in a way that when we are engaged in the operation, we can earn Bitcoins.

Bitcoin is interesting because it is a completely digital currency only existing on computers. In order to use it, we do not need anything else, we just have to download the client software, which is actually a digital wallet.

4.1.1. How does mining work?

"Mining is a distributed consensus system that is used to confirm waiting transactions by including them in the block chain. It enforces a chronological order in the block chain, protects the neutrality of the network, and allows different computers to agree on the state of the system. To be confirmed, transactions must be packed in a block that fits very strict cryptographic rules that will be verified by the network. These rules prevent previous blocks from being modified because doing so would invalidate all following blocks. Mining also creates the equivalent of a competitive lottery that prevents any individual from easily adding new blocks consecutively in the block chain. This way, no individuals can control what is included in the

[14] *See* http://bitcoins.hu/index.htm [cit. 2013-11-05].
[15] HARANGOZÓ, CSONGOR: *Megéri-e bitcoint bányászni?* [Is it Worth to Mine Bitcoin?]. Available at: http://www.chiponline.hu/2013/07/09/megeri-e-bitcoint-banyaszni/ [cit. 2013-11-05].

block chain or replace parts of the block chain to roll back their own spends."[16] After we have joined, the only thing left for us is to leave the PC on and run the program.

4.2. The road, its current position

Without the usual fundamental factors of traditional foreign currencies, most Bitcoin exchange rates are affected by news, rumours, current state of battle with regulators, closing a BTC exchange or re-opening or starting a new Bitcoin start-up. Overall, demand for the virtual currency spectacularly runs up when the focus of attention in international media is on Bitcoin.

On 29th October 2013, the first BTC Exchange called Coin floor opened in London. Initially, only British and European customers could trade with this virtual money.[17]

In the Dutch EMG Factors bar guests may pay with Bitcoin, no wallet, only a phone is needed. In order to provide guests with a virtual currency to pay certain sums, specially invented POS[18] terminals were installed in the place. Customers select what they want to drink, scan the corresponding QR code with their phone and the purchase is carried out.

While it was not the Dutch Bitcoin POS system which was the first one in the world and the currency was first not used for real-time, personal pay, this could be a leading practice, since the special NUVOPOS terminal can be introduced anywhere in the future.[19]

"In Canada, people have been able to use the world's first Bitcoin ATM, through it they can switch BTC to real money and vice versa. The vending machine has been installed in downtown Vancouver by Robocoin on which ten thousand dollars in cash flow

[16] *How does Bitcoin work?* Available at: https://bitcoin.org/en/how-it-works [cit. 2013-11-05].
[17] FALEY, STEPHEN: New UK Bitcoin exchange to bar clients, in *Financial Times*. Available at: http://www.ft.com/intl/cms/s/0/8223d270-3fe3-11e3-a890-00144feabdc0.html#axzz2jmdJa3Ku [cit. 2013-11-05].
[18] Point of Sale.
[19] *Bitcoin – mobile payment*. Available at: http://nuvopos.com/bitcoin/ [cit. 2013-11-05].

occurred during the first 81 transactions. The daily transaction limit is 3000 dollar now."[20]

After two huge rallies, the currency has worth more than 800$ for a single unit. This means that roughly 60 times more one than a year ago. According to many, Bitcoin is overpriced and worthless but as Bank of America analysts say, its fair value is around 1,300$. Although, it is still mainly considered as an investment, long term daily use of accounting unit may mean the fundamentals, which can make the virtual financial system viable. The world's regulators increasingly monitor the independent virtual money: some countries prohibit its usage, others see the potential.[21]

Russian authorities have issued warnings against using Bitcoin, saying the virtual currency could be used for money laundering or financing terrorism and that treating it as a parallel currency is illegal. »Systems for anonymous payments and cyber currencies that have gained considerable circulation – including the most well-known Bitcoin – are money substitutes and cannot be used by individuals or legal entities, « the Russian Prosecutor General's Office said on 6th February. It added that Russian law stipulates that ruble is the sole official currency and the introduction of any other monetary unit or substitute was illegal. On 27th January, Russia's central bank also said that Bitcoin trade was highly speculative and the unit carried a big risk of losing value.

Bitcoin community in the United States is far more developed than the one in Russia, it has already come under intense scrutiny as

[20] *Itt az első Bitcoin ATM* [Here is the First Bitcoin ATM]. Available at: http://hu.socialdaily.com/articles/2013/10/31/itt-az-elso-bitcoin-atm [cit. 2013-11-05].

[21] TURZÓ, ÁDÁM PÁL: *Felemelkedőben a virtuális pénzügyi rendszer?* [Is the Virtual Financial System Rising?]. Available at: http://www.portfolio.hu/vallalatok/felemelkedoben_a_virtualis_penzugyi_rendszer.193436.html [cit. 2014-01-04].

authorities crack down on illegal activity carried out using digital currency."[22]

4.3. How secure it is?

Bitcoin was not designed for large institutions and central banks do not have influence over it. Hence, Bitcoin can flow freely between users' machines. We will save the bank commissions, transfers are fast and we can only make transactions from our digital wallet, we do not need to be afraid from a government or a financial institution to lock our money. Of course, Bitcoins can be stolen, so we need to take care of them just like traditional physical funds. The only problem is that the value of Bitcoins fluctuates very frequently. In January 2013, they gave14 dollars for one unit, on 10th April when the rate peaked, this amount was 266 dollars, then suddenly it plunged to 50. On02/11/2014 it moves around 750 dollars.

The Bitcoin story has only begun. Well-known investment gurus such as the Winklevoss brothers believe in the future of digital currencies. In the previous quarter, a total of seven major investments were made in America by venture capital investors in the value of 12 million dollars, which amount is much higher compared to the period preceding the quarter of a 2 million investment.[23]

Bitcoin's theoretical and mathematical foundations are laid down very well, they are stable and reliable. The identification of account holders, transactions, logging and monitoring is made with known, well-established, – currently – unhackable cryptographic methods.[24]

For example, to use someone's private signature key for transactions – to transfer Bitcoins to our account– a 48 digit number needs to be found out. The used algorithms, data storage methods, network protocols are tested and there are proven solutions or great

[22] *Russian authorities say Bitcoin is illegal*. Available at: http://www.businessinsider.com/russian-authorities-say-bitcoin-is-illegal-2014-2 [cit. 2014-02-10].
[23] TURZÓ: *op. cit.*
[24] SHA-256, RIPEDM-160, ECDSA.

innovations. The system is pretty well protected against DoS attacks, for example if someone wants to transfer very small amounts, he has to pay much higher transaction fees (0.01 BTC), so it would be very expensive for a large scale attack.

Safety of the infrastructure is more problematic, the services are not integral parts of the system. More pools (= mining companies) have also been down for hours or days because of attacks, most recently, the largest Bitcoin exchange (MtGox) users' access data was stolen by hackers. With time, of course, it gets better from this point of view, users learn from their mistakes and will prefer a more reliable service.[25]

The European Banking Authority (EBA) have issued a warning to highlight the possible risks people may face when buying, holding or trading virtual currencies such as Bitcoin. Virtual currencies continue to hit the headlines and are enjoying increasing popularity.

However, you need to be aware of the risks associated with virtual currencies, including losing your money. No specific regulatory protections exist that would cover you for losses if a platform that exchanges or holds your virtual currencies fails or goes out of business.[26]

For example MtGox, the big Japan-based exchange, is temporarily halting all withdrawals as it faces technical issues. They sent a note to clients. They cannot serve so many various withdrawals at the current technical level and it is said that the system needs to be in a static state for a while. They temporarily pause all withdrawal requests. Because of this, the exchange rate of Bitcoin made a huge fall from 780 dollars to about 670 dollars on 2nd February 2014.[27]

[25] *See* http://bitcoins.hu/index.htm [cit. 2013-11-05].

[26] *EBA warns consumers on virtual currencies*. Available at: http://www.eba.europa.eu/-/eba-warns-consumers-on-virtual-currencies [cit. 2014-02-07].

[27] *Russian authorities say Bitcoin is illegal*. Available at: http://www.businessinsider.com/russian-authorities-say-bitcoin-is-illegal-2014-2 [cit. 2014-02-10].

There is no doubt that mining is not so big of a deal than before but with relatively little energy and cash investments a high profit can be generated and because it is independent from any state, – there are no charged commissions, taxes–it is a good way of wealth accumulation and storage or it can be when the market becomes stabilized.

4.3.1. What does this financial security mean? Best way of treasuring?

The best object for saving is preserving quality for a long time. What belongs to the essence of savings is when the market operator does not immediately want to trade his wares or income to goods or activities of others but wants to retain the ability to consume later.

The question is how much this saving tool will be worth later, whether it actually retains its value or not. In traditional societies there are stable exchange rates of commodity money but it may vary depending on the nature of abundance and scarcity of the chosen wares. The value of saving (accumulation) tool should not fluctuate in addition to physical characteristics of the device.[28]

Since the U.S. Securities Commission (SEC) announced that Bitcoin is a currency, U.S. regulators are dealing more and more with it. It can be used as money; goods and services can be bought for it and it can be changed to another currency such as dollar, Japanese yen, euro and Yuan. The only limit is in the few accept places.

Despite the high exchange rate and volatility, a crowd of "early adopter" merchants have joined the Bitcoin accepting network. In addition to the estimated tens of thousands of online traders, now some physical traders accept it, as well. Collection sites– coinmap.org – info says that there are nearly 2,200 shops around the world where we can pay with Bitcoin; in Hungary there are 6 places which are not online merchant or service providers. In Hungary, a dentist, an exhibition hall, three hotels and a server provider accept payment in Bitcoin.

[28] BOD: *op. cit.* 50.

4.3.2. Risks [29]

The EBA has identified several characteristics and risks that people should be aware of when buying, holding, or trading virtual currencies.

You may lose your money on the exchange platform. If an exchange platform loses any money or fails, there is no specific legal protection – for example through a deposit guarantee scheme – that covers you for losses arising from any funds you may have held on the exchange platform, even when the exchange is registered with a national authority.

Your money may be stolen from your digital wallet.[30] Once you have bought virtual currency it is stored in a 'digital wallet', on a computer, laptop or smart phone. In addition, if you lose the key or password to your digital wallet, your virtual currency may be lost.

When using virtual currencies as a means to pay for goods and services you are not protected by any refund rights under EU law offered, for example, for transfers from a conventional bank or other payment account. Unauthorized or incorrect debits from digital wallet can therefore not usually be reversed.

You should be aware that holding virtual currencies may have tax implications, such as value added tax or capital gains tax. You should consider whether tax liabilities apply in your country when using virtual currencies.[3132]

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[29] *EBA warns consumers on virtual currencies*. Available at: http://www.eba.europa.eu/-/eba-warns-consumers-on-virtual-currencies [cit. 2014-02-07].

[30] This is the reason of the shutting down of Flexcoin – a Canadian Bitcoin stock exchange – on March 3.

[31] The Japanese government will set rules for trading Bitcoins, defining the virtual tender not as a currency but as a commodity akin to gold. Significantly, the guidelines will call for taxing Bitcoin transactions. Purchases made in Bitcoins will be subject to Japan's consumption tax, which is set to rise to 8% on April 1. Trading gains will be taxed, and companies will need to pay tax on revenue earned from Bitcoin transactions. But enforcement could prove difficult, as tax authorities will have to track down users.

5. FUTURE OF BITCOIN (AND QUASI MONEY), CONCLUSIONS[33]

5.1. Bitcoin helps average people

According to Wences Casares's – growing up in Argentina – opinion, the same thing happens today as it happened in Argentina back then. People are desperately looking for a tool, a reserve to preserve or transfer their money into and for something which will not lose its value and the government cannot take it away. One of these tools can be Bitcoin. Casares, among other banking professionals, agrees that this money can be a tool that will help restore damaged and compromised Latin American and Asian banks.

5.2. Bitcoin is too complicated and will remain the same for some time

Mike Hearn – Google engineer – develops applications for Bitcoin in 20 percent of his time. He and Bennett Hoffman – former Microsoft Engineer – agree that the system that creates Bitcoin is stable and secure but for the average user it is too complicated and it surely will be like that for some time.

5.3. Bitcoin will be regulated

The U.S. Department of the Interior seized the locked property of the owner of MtGox – the largest Bitcoin exchange –, saying that the stock market and the "money" indicate serious security risks and support black economy.

Surprisingly, Bitcoin supporters welcomed the government's increasing intervention. The Ribbit Capital – one of the major Bitcoin investors – says that the regulation is not only inevitable but also desirable. Other Bitcoin Funds also stated that they are less

[32] *Japan to regulate Bitcoin trades, impose taxes*. Available at: http://asia.nikkei.com/Politics-Economy/Policy-Politics/Japan-to-regulate-Bitcoin-trades-impose-taxes [cit. 2014-03-06].

[33] *The three futures of Bitcoin: Three predictions form experts*. Available at: http://www.businessweek.com/articles/2013-05-20/the-future-of-bitcoin-three-predictions-from-experts#p1 [cit. 2013-11-08].

attracted by the more liberal ideas and imagine rational and well-defined rules for the new currency.

The virtual currencies volatility is raising a vicious circle problem: it is considered by many as a serious impediment to the widespread of Bitcoin adoption but the hectic movement of price scan be reduced trough its spread in everyday usage, thus, confirming Bitcoin's accounting unit role, which is perhaps the most important foundation. A much more liquid exchange market would also help in the treatment of this problem.

In the long term, widespread everyday usage can guarantee the rise of Bitcoin along with a virtual, independent financial system.

While many governments do not like the spread of Bitcoin and its popularity, Singapore tax authorities have decided to recognize the virtual money. They released a clever booklet for Bitcoin traders about how to manage tax obligations in that regard.[34]

The tax office gives comprehensive and detailed information on how to manage profits, trading and tax. Singapore-based Bitcoin broker, Coin Republic welcomed this guide, which means that at least they are aware of their obligations.

For example, if we pay for a product or a service with Bitcoin, we need to pay tax. Bitcoin trade also generates, as well as in stock, so you have to pay the usual taxes after that.

"Nobel Laureate economist Robert Shiller is on a panel at Davos about digital trends in financial markets. Almost immediately he started talking about Bitcoin. He says that he finds it to be an »inspiration« because of the computer science. But he is not into it as an economic advance. As a currency, he says it is a return to the Dark Ages."[35]

[34] *Singapore Tax Authorities (IRAS) Recognize Bitcoin and Gives Guidance*. Available at: http://coinrepublic.com/singapore-tax-authorities-iras-recognize-bitcoin-and-gives-guidance/ [cit. 2014-01-08].

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[4] CHEREDAR, TOM: Forget piracy, U.S. government is going after Bitcoin. Available at: http://venturebeat.com/2011/06/08/government-crackdown-on-bitcoin/ [cit. 2013-11-10].
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[6] FALEY, STEPHEN: New UK Bitcoin exchange to bar clients. in *Financial Times*. Available at: http://www.ft.com/intl/cms/s/0/8223d270-3fe3-11e3-a890-00144feabdc0.html#axzz2jmdJa3Ku [cit. 2013-11-05].
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[10] *Itt az első Bitcoin ATM* [Here is the First Bitcoin ATM]. Available at: http://hu.socialdaily.com/articles/2013/10/31/itt-az-elso-bitcoin-atm [cit. 2013-11-05].
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János KÁLMÁN

The International Regulation of Private Security Providers – a Brief Analysis

1. INTRODUCTIONS

"Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies…"[1] – writes *Machiavelli* in his groundbreaking work, *The Prince*, giving substratum to numerous thinkers of contemporary international literature, who are concerned with the outsourcing of military and security activities.[2] However, reality requires unfolding another side of the question, namely that private security providers do not follow the heritage of mercenaries. By national financing, they end such conflicts that must not unfold.[3] To be faced with this, the present study is intended to lay down that the private military and security contractors (hereinafter: private security providers) shall not be considered in the terms of public international law, as mercenaries because they only meet the definition's – which is hard law in the

[1] MACHIAVELLI, NICCOLÓ: *The Prince*, 2008, Sterling Publishing, New York, 120.

[2] *See* GULAM, HYDER: *The rise and rise of Private Military Companies*. Available at: http://media.peaceopstraining.org/theses/gulam.pdf [cit. 2014-03-12] 3.

[3] BEUTEL, M. DEE: *Private Military Companies: Their emergence, importance, a call for global regulation* (thesis). Available at: http:// princess.digitalfreaks.org/thesis/beutelmdthesis.pdf [cit. 2014-03-12] 10.

context of international treaties[4] – conjunctive conditions a few times.[5] So they are not mercenaries in terms of public international law but Machiavelli's thoughts could be word-paint in connection with private security providers.

The last decades have seen an enormous explosion in the use of private security providers by governments, industry, the United Nations and humanitarian organizations.[6] Meanwhile, the

[4] Three international treaties deal with the notion of mercenaries: 1.) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 1977, UN Reg. No. 17512.; 2.) Organization of African Unity Convention for the elimination of mercenarism in Africa, Libreville, 1977, UN Reg. No. I-25573.; and 3.) International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, New York, 1989. december 4., UN Reg. No. 37789. that was meant to be universal.

[5] For more details, *see* KÁLMÁN, JÁNOS: Mercenaries reloaded? Applicability of the notion of 'mercenaries' in relation to private military companies and their employees, in *Acta Juridica Hungarica*, Vol. 54. No. 4. (2013) 367-383.

[6] "The expansion was in large part a byproduct of the post-Cold War peace dividend. The downsizing of national militaries increased the supply of soldiers-for-hire. Equally important, the end of the Cold War and dissolution of the Soviet Union did not bring about an end to international conflict. Forces to confront new, unfamiliar threats, nations that had downsized their militaries suddenly found themselves shorthanded. They needed to supplement their now-modest, in-house capabilities." *See* MICHAELS, JON D.: Private Military Firms, the American Precedent, and the Arab Spring, in *Stanford Journal of International Law*, Vol. 48. No. 2. (2012) 280. *See* for more details FARKAS, ÁDÁM – HORVÁTH, LÍVIA: Zuhanó pályán csúcsra járatva? Gondolatok a védelmi tevékenységek kiszervezésének történetiségéről [Some Thoughts on the History of Security Outsourcing], in *De iurisprudentia et iure publico*, Vol. 7. No. 3. (2013) 25-43.; FARKAS, ÁDÁM: A régi és az új harca: a védelmi tevékenységek kiszervezése [The Struggle Between Old and New: The Outsourcing of Defence], in *Közjogi Szemle*, Vol. 6. No. 2. (2013) and FARKAS, ÁDÁM: A védelmi tevékenységek kiszervezésének elméleti és felelősségi

accountability of these companies and their personnel – not to mention states' responsibility – for violations of human rights, such as the Blackwater massacre in Nisour Square[7] and the torture of detainees in Abu Ghraib[8] have not kept pace. This clearly shows that this subject is critical and problematical in various relations.

Let us not forget that the claim to legitimate violence has long been understood to be the exclusive domain of states, as the German sociologist, philosopher, and political economist, Max Weber defined the state as an entity which successfully claims the "monopoly of the legitimate use of physical force within a given territory".[9] Mercenaries and private security companies challenge this neat schema, a challenge that has achieved greater significance due to the rise in the usage of private forces following the end of Cold War.[10]

Taking the abovementioned phenomena into consideration, this study briefly analyses the existing but deficiant international regulation of private security providers (*2. Regulations of public international law – hard law*) and the increasing non-binding regulations (*3. "Regulations" of international soft law*). The international community to protect human rights should regulate this area of warfare not only at the field of soft law but at the field of public international law, as well as at the field of domestic law. This

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alapproblémái [Theoretical Problems and Responsibility Issues of Defence Outsourcing], in *Közjogi Szemle*, Vol. 6. No. 4. (2013).

[7] *See* TIEFER, CHARLES: No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After, in *Oregon Law Review*, Vol. 88. No. 3. (2009) 745-775.

[8] *See* AMANN, DIANE MARIE: Abu Ghraib, in *University of Pennsylvania Law Review*, Vol. 153. (2005) 2085-2141.

[9] WEBER, MAX: *The vocation lectures*, 2004, Hackett Publishing, Indianapolis, 33.

[10] CHESTERMAN, SIMON – LEBNARDT, CHIA: Form mercenaries to market: The rise and regulation of private military companies (Introduction), in *Public Law & Legal Theory Research Paper Series Working Paper,* No. 07-09. (2007) 1.

paper indicates the most important parts of the potential international regulation (*4. Back to public international law*).

2. REGULATIONS OF PUBLIC INTERNATIONAL LAW – HARD LAW

Some researchers suggested that private security providers function in the "*grey area*" of public international law.[11] Under "*grey area*" they meant that private security providers' operation is partly regulated and partly they operate freely. This conclusion is simply false if we systematically analyse the regulations of public international law. The regulation of private military providers rests on two pillars: a.) *international human rights law* and b.) *international humanitarian law*. International human rights law and international humanitarian law (hereinafter: IHL) are two distinct but complementary bodies of international law. IHL is applied in armed conflicts, while human rights law is applied at all times, either in times of peace or war.

Obviously, there is no – at the present – specific international legal regime for the regulation of private security providers. Thus, when considering existing regulations of public international law, the following distinction should be drawn. "On the one hand, it has to be taken into account to what extent the current international legal regime contains principles and rules that may directly or indirectly affect the use of private military companies in certain cases. Only then, on the other hand, after having ascertained existing standards, can the development and enhancement of these legal regimes be tackled successfully, not only on international level but also by

[11] *See* LIU, HIN-YAN: Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company, in *Journal of Conflict & Security Law* Vol. 15. Issue 1. (2010) 159.; CRAWFORD, EMILY: The Civil-Military Interface in 21st Century Armed Conflict – Private Military Contractors and the Principle of Distinction, in *Sydney Law School Research Paper,* No. 11/45. (2011) 3.

incorporating general international legal standards into more detailed national legislation."[12]

With no claim of being exhaustive, some of the most important international regulations are emphasized in detail, which can refer to private security providers.

First of all, at the field of *international human rights*, the *Universal Declaration of Human Rights* (hereinafter: UDHR) shall be firstly highlighted. UDHR, which was adopted by the UN General Assembly on 10 December 1948,[13] is generally and widely considered to be the foundation of international human rights law. Though it seems non-binding because it was adopted by a General Assembly resolution, the vast majority of the UDHR's articles have customary law effect, and that is the reason it is often referenced as the authoritative legal source and a constraint on private behaviour. This argumentation closely interlinks a number of articles relevant to private security services, including Article 3 (*right to life*), Article 5 (*prohibition on torture*), Article 7 (e*qual protection under the law*), Article 9 (*prohibition on arbitrary arrest and detention*), Article 10 (*fair and public hearing*) and Article 11 (1) (*presumption of innocence*), as well.

The *International Covenant on Civil and Political Rights*[14] (hereinafter: ICCPR),[15] commits signatory states to respect the classical civil and political rights of individuals. These classical rights include the *right to life* (Art. 6.), *prohibition of torture* or cruel, inhuman or degrading treatment or punishment (Art. 7) *right to liberty and security* (Art. 9.) and *equality before courts and tribunals* (Art. 14.). These rights could be violated by any agents or company employees providing military or security services, including private security providers. The Optional Protocol to ICCPR, also adopted in

[12] KEES, ALEXANDER: Regulation of Private Military Companies, in *Goettingen Journal of International Law*, Vol. 3. No. 1. (2011) 201.
[13] UN Resolution A/RES/217 (III).
[14] Adopted in 1966 and entered into force on 23 March 1976.
[15] International Covenant on Civil and Political Rights, New York, 16 December 1966, UN Reg. No. 14668.

1966, sets up systems for the Human Rights Committee to receive and consider claims from individuals who may be victims of human rights violations by any signatory states. In connection with private security providers, the Human Rights Committee expressed that "the State is, thus, responsible for ensuring that delegated activities are carried out in full conformity with its international obligations, particularly human rights obligations."[16]

Some international human law treaties on special regulatory areas should be mentioned, while the international regulation of private military providers shall be analysed. The *Convention Against Torture* (hereinafter: CAT),[17] prohibits the use of torture or any other inhuman or degrading treatment in attempting to obtain information from a suspect. According to Art. 2. of CAT, each State Party shall take effective *legislative*, *administrative*, *judicial* or other *measures* to prevent acts of torture in any territory under its jurisdiction, so CAT demands national regulation. It is one of the most important declarations to be observed by military and security officials in the exercise of their duty and accountability. CAT established the *Committee Against Torture*, which can consider individual complaints and complaints about torture from one state about another. Just to give an example regarding the role of the Committee, it investigated the torture of detainees in Abu Ghraib,[18] which was also subject to investigation and judicial procedure in the United States. Finally, the study mentions the *International Convention for the Protection of All Persons from Enforced Disappearance*

[16] International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights Office of the High Commissions, New York and Geneva, 2011, available at: http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf [cit. 2014-03-12] 3.

[17] Adopted in 1984, entered into force in 1987.

[18] Shadow Report – Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 27 July 2007. Available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_NGO_AUS_40_8014_E.pdf [cit. 2014-03-12].

(hereinafter: Convention),[19] which was adopted both by the Human Rights Council and the UN General Assembly by consensus in 2006 and entered into force in December 2010. According to Art. 1. of the Convention, no one shall be subjected to enforced disappearance. Thus, the Convention identifies enforced disappearance as a self-standing human rights violation, prohibits secret detention and establishes the rights of families to get information about what has happened to their relatives and about the location of their relatives who have been detained. States being part of the Convention must incorporate a specific crime of enforced disappearance into their national laws, investigate complaints and reports of enforced disappearance and bring those responsible to justice.[20]

International humanitarian law – as the other pillar of international regulation of private security providers – is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflicts. The Hague Conventions of 1907 were among the first formal statements of laws of war and war crimes. The *Hague Convention on Neutral Powers*[21] restricts neutral states from providing either direct or indirect assistance to warring states; in particular, belligerents cannot move troops or convoys or either munitions of war or supplies across the territory of a neutral state (Art. 2.), neither corps of combatants can be formed nor recruiting agencies can be opened in the territory of a neutral state (Art. 4.). In this context, the term 'combatants' does not have the same meaning as in – later mentioned – Geneva Conventions of 1949. It is a much broader term; therefore, this provision can also apply for the case of

[19] International Convention for the Protection of All Persons from Enforced Disappearance. New York, 20 December 2006. UN Reg. No. 48088.

[20] *See* http://psm.du.edu/international_regulation/generally_applicable_international_law.html [cit. 2014-03-12].

[21] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Hague, 18 October 1907.

private security providers'.[22] In accordance with Art. 5., neutral states are obliged to prevent and punish "acts in violation of its neutrality unless the said acts have been committed on its own territory". According to Art. 6., neutral states can only escape from the responsibility if people from their territory are "crossing the frontier separately to offer their services to one of the belligerents." It has been suggested that the Hague Convention thus prevents states from allowing private military and security firms to incorporate or operate from their territory.

The core regulation of private military providers in the field of IHL is based on the *Geneva Conventions of 1949* and the two *Additional Protocols of 1977*. The Geneva Conventions separate combatants from civilians and protects those who do not or no longer directly participate in hostilities: civilians and people taken captive in military conflicts (prisoners of war). The debate is going on in literature whether private military providers are lawful or unlawful combatants (mercenaries) or whether they are civilians under the Geneva Conventions.[23] The question cannot be satisfactorily answered and this ambiguous situation shall not allowable in armed conflicts. Today, most parts of the Geneva Conventions and their Additional Protocols are regarded as customary international law binding on all states and all parties of conflicts, including private security providers operating in the conflict zone.

The *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* was adopted by UN General Assembly in 1989 and came into force in 2001. This Convention tries to give a broader concept of mercenaries than the Additional

[22] VÉGH, KÁROLY: 'Warriors for Hire?' – Private Military Contractors and the International Law of Armed Conflicts, in *Miskolc Journal of International Law*, Vol. 5. No. 1. (2008).

[23] *See* RIDLON, DANIEL P.: Contractors or illegal combatants? The status of armed contractors in Iraq, in *Air Force Law Review*, Vol. 62. (2008) 192-253. and KIDANE, WON: The status of private military contractors under international humanitarian law, in *Denver Journal of International Law & Policy*, Vol. 38. (2010) 361-420.

Protocol I., the Convention criminalizes their use and prohibits states from recruiting, using, financing or training mercenaries. The Convention is not self-executing and requires transformation into national legislation.

Finally, even though it is not an international treaty, the *Draft Articles of State Responsibility* shall be emphasized which were adopted by the International Law Commission (ILC) in 2001. According to Art. 5. of the Draft Articles, "the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise element if the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." Thus, if a State avails services of private security providers, it is responsible for the acts that private security providers commit.

To summarize the abovementioned treaties and draft articles, we cannot accept the theory that private security providers operate in a grey zone but it is true that private security providers' operation zone is *not clearly defined by international legal norms*. The regulations of international human law and international humanitarian law exist and also refer to private security providers. The main *problem is* that in *default of a specific legal regime*, *limits and guidelines for the use of private security providers* or contractors have to be deducted from the abovementioned general international treaties. Such rules are not only those that reserve certain functions explicitly for state organs but in other cases, states may have to exercise 'due diligence' in a way that a private security provider must be supervised by state organs. The problem is that it is up to states and their national administration to implement these general rules by adopting effective legislative and administrative measures that govern the use of private security providers in detail.[24] In spite of the necessity of national regulation, we can say that it barely exists. As *Maidment* says, states have to face with the major risks of inadequacy, inapplicability and ineffectiveness of the domestic regulation of the private security

[24] KEES: *op. cit.* 201.

industry.[25] Since private security providers are much more complicated than a simple armament sale, they should have a more detailed process for the approval of their contracts.[26]

The Human Rights Council, which is the successor of the UN Commission on Human Rights, established in 2006, realized this problem and in 2010 it adopted resolution 15/26[27] by which it decided "to establish an open-ended intergovernmental working group with the mandate to consider the possibility of *elaborating an international regulatory framework*, including, inter alia, the option of elaborating a *legally binding instrument* on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group[28] on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination."[29]

[25] MAIDMENT, ERICA: New legal aspects of Canadian involvement in the private military industry, in *Canadian Law Library Review*, Vol. 35. No. 2. (2010) 72.
[26] BEUTEL: *op. cit.* 42.
[27] Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. A/HRC/RES/15/26.
[28] The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (hereinafter: Working Group) was established in July 2005, pursuant to Commission on Human Rights resolution 2005/2. It succeeded the mandate of the Special Rapporteur on the use of mercenaries, which had been in existence since 1987 and was serviced by Mr. Enrique Bernales Ballesteros (Peru) from 1987 to 2004 and Ms. Shaista Shameem (Fiji).
[29] A/HRC/RES/15/26. point 4.

3. "REGULATIONS" OF INTERNATIONAL SOFT LAW

As this short outline illustrates, international human law and IHL provides a regulatory framework for private security providers and their employees but no detailed regime exists – in public international law – which could ensure law enforcement, implementation of international law, transparency of private security providers and mostly the oversight mechanism over their operation.
To face with the increase in the use of private security providers (Afghanistan, Iraq, Arab Spring, etc.), the rise of injury of rights by the operation of private security providers and the absence of detailed international regulations, in recent years, significant efforts have been taken to enhance the regulatory framework applicable to private security providers and their employees. These efforts have taken place at international, domestic, industry and company levels – leading to the emergence of a *disorganized and decentralized regulatory framework*.[30] Few have sought to understand, analyse or assess the regulatory framework applicable to the private security and military industry.[31]

In this paper, the author would like to analyse only one direction of this decentralized regulatory framework. This is a very *practical* process which was launched by the Swiss government and the International Committee of the Red Cross (hereinafter: ICRC) in 2006 which is called as the *Swiss Initiative*. The Swiss Initiative

[30] RICHEMOND-BARAK, DAPHNÉ: Regulating War: A Taxonomy in Global Administrative Law, in *European Journal of International Law*, Vol. 22. No. 4. (2011) 1028.
[31] DE NEVERS, RENÉE: (Self) Regulating War?: Voluntary Regulation and the Private Security Industry, in *Security Studies,* Vol. 18. No. 3. (2009) 479-516; and COCKAYNE, JAMES: Regulating private military and security companies: The content, negotiation, weaknesses and promise of the Montreux Document, in *Journal of Conflict & Security Law,* Vol. 13. No. 4. (2009) 401-428.

started with the *Montreux Document*,[32] continued with the *International Code of Conduct for Private Security Service Providers* (hereinafter: ICoC)[33] and was completed with the establishment of the *International Code of Conduct for Private Security Service Providers' Association* (hereinafter: ICoCA).[34]

3.1. The Montreux Document

The Montreux Document – as it is mentioned before – is the result of an initiative launched jointly by Switzerland and the ICRC. The drafting of the Montreux Document was based on the work of four intergovernmental meetings which took place between January 2006 and September 2008.

The Montreux Document provides the clearest statement to date legal norms and business administrative and regulatory practices that shape the relationship between states and private security providers.[35] The Montreux Document was developed with the participation of governmental experts and representatives of civil society and the private military and security industry also consulted in it. Currently, there are 50 states[36] that support the Montreux Document,[37] 17 states jointly finalised the document on the occasion of a concluding

[32] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (hereinafter: Montreux Document) adopted on September 17, 2008 and presented the UN General Assembly, *see* A/63/467-S/2008/636. Available at: http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm [cit. 2014-03-12].

[33] Available at: http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [cit. 2014-03-12].

[34] Available at: http://www.icoc-psp.org/uploads/ICoC_Articles_of _Association.pdf [cit. 2014-03-12].

[35] COCKAYNE: *op. cit.* 402.

[36] *See Figure 1.*

[37] The last three states that joint to the Montreux Document are: Czech Republic, Luxemburg and Japan.

meeting in Montreux, Switzerland, on 17 September 2008.[38] It has to be mentioned that besides states, the European Union, the Organization for Security and Co-operation in Europe and the North Atlantic Treaty Organization also joined the Montreux Document.

The preface of the Montreux Document makes it clear that certain well-established rules of international law apply to states in their relations with private military and security companies and their operation during armed conflict, in particular under IHL and human rights law. The Montreux Document recalls existing legal obligations of states and private security providers and their personnel (*Part One*) and provides states with good practices to promote compliance with IHL and human rights law during armed conflicts (*Part Two*). Furthermore, the preface suggests that the Montreux Document is not a legally binding instrument and does not affect existing obligations of states under customary international law and under international agreements. The Montreux Document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law.

So, the Montreux Document is built on two pillars, each with different status, sources and scope. On one hand, *Part One* provides a conservative statement of *lex lata*, so this part summarizes the pertinent international legal obligations relating to private security providers. It has a narrow scope because it refers to the operation of private security providers during armed conflicts and was drafted relying on traditional international law sources.[39] It is very important that the statements are drawn from various IHL and human rights agreements and customary international law. Each state is responsible for complying with the obligations it undertook pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made as well as to

[38] Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine and United States of America.
[39] COCKAYNE: *op. cit*. 404-405.

customary international law. Part One ascertains the obligations of contracting states,[40] territorial states,[41] home states,[42] all other states[43] and even private security providers and their employees.[44] On the other hand, *Part Two* only reflects 'good practice' and not law. The good practices are intended, *inter alia*, to assist states to implement their obligations under IHL and human rights law.[45] It provides a non-exhaustive compendium of illustrative good practice for states discharging their existing legal obligations that is why it has a much more expansive scope.[46]

The Parliamentary Assembly of the Council of Europe in its *Recommendation 1858 (2009)* recommends that the Committee of

[40] *E.g.* contracting states are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSC's and their personnel.

[41] *E.g.* territorial state have an obligation, within their power, to ensure respect for international humanitarian law by PMSC's operating on their territory.

[42] E.g. home state have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breach of the Geneva Conventions and, where applicable, Additional Protocol I., and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts.

[43] *E.g.* all other states have an obligation, within their power, to ensure respect for international humanitarian law.

[44] *E.g.* the status of the personnel of PMSC's is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.

[45] *E.g.* determination of services; procedure for the selection and contracting of private security providers; criteria for the selection of private security providers; terms of contract; monitoring compliance and ensuring accountability.

[46] COCKAYNE: *op. cit.* 405.

Ministers, on behalf of the Council of Europe, shall support the Montreux Document, which sums up legal obligations under existing international law and best practices related to PMSCs' activities and calls on member states that have not already done so, to endorse it.[47]

The Working Group has welcomed the effort to clarify states' commitments in international law and good practices related to operations of private security providers and considered the Montreux Document useful in recalling existing obligations of states under IHL and international human rights law.[48] The Working Group believes, however, that the Montreux Document failed to address the regulatory gap in the responsibility of states with respect to the conduct of private security providers and their employees. One of the problems is that the initiative only represents part of the wide spectrum of countries and their approaches. The Swiss Initiative has not been as broad a consultative process as it is required under the UN system. For example, states form Latin America and the Caribbean region did not participate in work and the unbalanced representation of Western Group States denotes the heavy involvement of countries where most of the security industry originates and operates form. Neither UN departments, nor the Working Group took part in the initiative. Another problem is that the Montreux Document places heavier burden of responsibility on "territorial states" (states where private security providers operate) than on "contracting states" or "home states" from where these companies originate from or where they operate. Furthermore, there are no provisions in the Montreux Document referring to that states should strengthen government standards for procurement,

[47] Council of Europe Parliamentary Assembly *Recommendation 1858* (2009) Private military and security firms and erosion of the state monopoly on the use of force.

[48] RONA, GABOR: A tour de horizon of issues on the agenda of the Mercenaries Working Group, in *Minnesota Journal of International Law*, Vol. 22. No. 2. (2013) 336.

contracting and management of private security providers and security industry backed by an effective reporting mechanism.[49]

Not just the Working Group but key NGO's, who were involved in the process, raised certain concerns. E.g. the Amnesty International stated that some relevant and well-established propositions of international human rights law were not fully reflected in the Montreux Document, including states' obligation to protect and apply the standards of '*due diligence*'.[50]

Despite of the critics, by interpreting and applying existing international legal obligations to private security providers, the Montreux Document began to extract them from their *not clearly defined* operation zone and served as an exemplar for the interpretation of other existing laws.

3.2. ICoC and ICoCA

In response to industry demands – building on the foundation of the Montreux Document – to develop international standards for private security providers, the Swiss government and the ICRC launched another initiative to develop an *International Code of Conduct for Private Security Service Providers* which articulates clear standards for private security providers based on international human rights law and IHL, as well as to develop an independent oversight and compliance mechanism to provide effective sanctions when they breach ICoC.[51] The ICoC was signed by 58 private security providers

[49] Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. UN Doc. A/HRC/10/14 (21 Jan. 2009) 42-48.

[50] *See* Amnesty International Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict. Available at: http://www.amnesty.org/en/library/asset/IOR30/010/2008/en/5bca5962-99de-11dd-bf88-f59215f3db50/ior300102008en.pdf [cit. 2014-03-12].

[51] BUZATU, ANNE-MARIE – BUCKLAND, BENJAMIN S.: Private military & security companies: Future challenges in security governance, in *DCAF Horizon 2015 Working paper,* No. 3. (2010) 23.

from fifteen countries at a signing ceremony in Geneva on 9 November 2010. By signing it, companies publicly affirmed their responsibility to respect the human rights of, and to fulfil humanitarian responsibilities towards all those affected by their business activities. According to the Preamble, signature of the ICoC is the *first step in a process towards full compliance*. Signatory companies need to: (1) establish and/or demonstrate internal processes to meet the requirements of the Code's principles and standards deriving from the Code; and (2) once the governance and oversight mechanism is established, become certified by and submit to ongoing independent auditing and verification by that mechanism. Companies having signed it undertake to be transparent regarding their progress towards implementing the Code's principles and the standards deriving from the Code.

The ICoC sets-out human rights based principles for the responsible provision of private security services. These include rules for the use of force; detention; prohibition of torture or other cruel or degrading treatment or punishment; human trafficking and other human rights abuses; prohibition of slavery and forced labour; prohibition on the worst forms of child labour; discrimination etc. and specific commitments regarding the management and governance of companies, including how they select and vet personnel and subcontractors; training of personnel; manage weapons and handle grievances internally.

ICoC has proved to be popular in the industry and on 10 April 2014, *708 companies* have signed onto it.[52] While the number of the signatory companies in itself a significant accomplishment, the process of translating the ICoC's principles into enforceable standards has just begun. From the beginning, the ICoC process foresaw the establishment of an independent mechanism for governance and oversight.

[52] *See Figure 2.* and *see* The International Code of Conduct for Private Security Service Providers Signatory Companies. Available at: http://www.icoc-psp.org/uploads/Signatory_Companies_-_September_2013_-_Composite_List-1.pdf [cit. 2014-03-12].

To have power in the "norms" of ICoC, at September 2013, the *International Code of Conduct for Private Security Service Providers' Association* was established. The purpose of this Association is to promote, govern and oversee the implementation of ICoC and to promote the responsible provision of security services and respect for human rights and national and international law in accordance with ICoC.

Membership in ICoCA shall be *divided into three membership categories* reflecting stakeholder pillars: Private Security Companies and Private Security Service Providers pillar, civil society organization pillar and the government pillar.[53] Private security providers shall be eligible for membership upon certification under ICoCA's treaty Article 11.

According to Article 11, ICoCA shall be responsible for certifying under ICoC that a company's systems and policies meet the Code's principles and the standards deriving from the Code and that a company is undergoing monitoring, auditing and verification, including in the field. ICoCA shall be responsible for exercising oversight of Member companies' performance under the ICoC, including thorough external monitoring, reporting and a process to address alleged violations of the code. If ICoCA determines that corrective action is required to remedy non-compliance with the ICoC, ICoCA shall request a Member company to take corrective action within a specific time period. Should a Member company fail to take reasonable corrective action within the period specified by ICoCA, or fail to act in good faith in accordance with these Articles, then ICoCA shall *initiate suspension proceedings* in accordance with these Articles. In the compliance process, if, after further consultation with the complainant and the Member company, ICoCA considers that the Member company has failed to take reasonable corrective action within a specified period or cooperate in good faith

[53] The ICoCA comprises 6 states (Australia, Norway, Sweden, Switzerland, United Kingdom and United States of America), 150 companies, and 13 civil society organizations.

in accordance with this Article, it shall take action, which may include *suspension* or *termination of membership*.

If we analyse international processes – which were mainly influenced by the Swiss Initiative – we can say that ICoC is a very successful attempt regarding the regulation of private security providers. Much more successful than UN's draft regulation,[54] which contains very far-reaching obligations and restrictions for states that exceed current standards under international law. "It seeks to extend existing legal obligations and to increase restrictions. As far as it restricts the use of private contractors, this approach seems to be in conflict with the actual practice and the evident opinion of a large number of states regarding that the employment of contractors is generally a sovereign decision of the state."[55]

Even if the legal nature of ICoC is only considered to be an international soft law, major clients of private security contractors have already begun to reference the Code in their contracts. The UN Security Management System's '*Guidelines on the Use of Armed Security Services from Private Security Companies*'[56] makes mandatory requirement for possible selection regarding that private security providers must be member companies in ICoC. States are also beginning to incorporate ICoC into national legislation. The Swiss Parliament considered a draft *Federal Act on Private Security Services Provided Abroad* (hereinafter: Draft Act) in 2013.[57] Art. 7 of the Draft Act regulate the adherence to the International Code of Conduct for Private Security Service Providers. This Article says that companies shall have an obligation to become signatories to ICoC.

[54] Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council. UN Doc. A/HRC/WG.10/1/2.

[55] KEES: *op. cit.* 211.

[56] Available at: http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOf ArmedSecurityServices.pdf [cit. 2014-03-12].

[57] *See* http://www.ejpd.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/entw-e.pdf [cit. 2014-03-12].

Furthermore, according to Art. 14, the competent authority shall prohibit in full or in part the exercise of an activity by a company that does not comply with the provisions of ICoC. Recently, also the US Department of State indicated that "(a)s long as the ICoC process moves forward as expected and the association attracts significant industry participation, the Bureau of Diplomatic Security (DS) anticipates incorporating membership in the ICoC Association as a requirement in the bidding process for the successor contract to the Worldwide Protective Services (WPS) program."[58] *In light of these, the present study must conclude that legally non-binding nature of ICoC is starting to change and, as its rules become a reference point to the states, it evolves into harder international law.*

4. CONCLUSIONS

According to *Buzatu* and *Buckland,* "(i)n times of increasing security threats – both public and private – which affect states and a multitude of private actors as well as decreasing state capacity to meet those threats, the trends to use private military and security companies will likely continue to increase and shape international security. In defiance of the traditional paradigm of state-centric security, these private security actors pose real challenges to effective regulation of their services, particularly accountability for violations of human rights and remedies to victims."[59] While the Montreux Document, the ICoC and the ICoCA are important initiatives, these do not address the key issue of accountability and responsibility. As a non-governmental instrument which is not legally-binding and is not backed by State criminal and administrative sanctions, it cannot address the essential human rights issues of accountability for private security providers and their employees who commit human rights and IHL abuses.

[58] *See* http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm [cit. 2014-03-12].
[59] BUZATU – BUCKLAND: *op. cit.* 24.

As we could see, the legally non-binding nature of ICoC is starting to change and evolve into harder international law. In my interpretation, the regulations of ICoC – *in the long term* – could transfer into new international regulations, most likely in the form of *a new international convention*. This future convention suggests initiatives to private security providers to formulate an industry-wide legally binding code of conduct, which would set appropriate human rights perspective, standards and guidelines, with punitive measures. According to this convention, every state must review their legal system and have to implement the conventions' regulation into their domestic law. This convention should establish an agency, which role would be to monitor private security contractors' operation and the conventions' implementation in domestic law, also its role would be to set up an international register. It would be important to consider that the abuses of IHL and international human law by private security providers shall be placed under the jurisdiction of International Criminal Court.

Unfortunately, reality suggests another direction. In the foreseeable future the establishment of an international binding instrument that regulates the abovementioned themes in detail is unlikely. That is why the implementation and further specification of requirements imposed by international law should be achieved in domestic law, mainly regarding administrative, civil and of course, criminal law. In this context, the role of the European Union should be subject of further analyses.

FIGURES

Figure 1. Participating States of the Montreux Document[60]

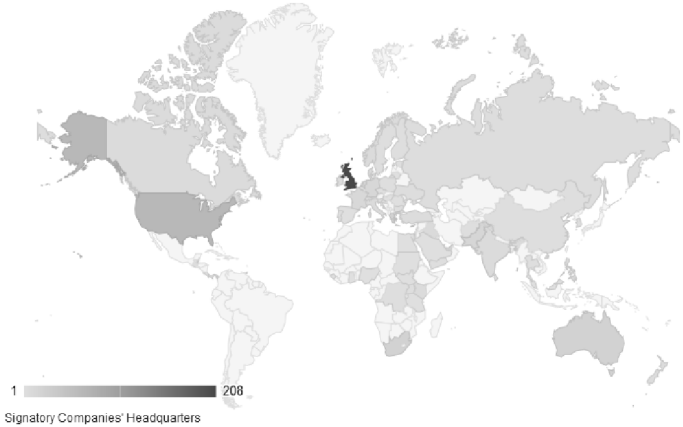

Figure 2. Number of ICoC Signatory Company Headquarters per Country[61]

[60] Available at: http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html [cit. 2014-03-12].

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Roland KELEMEN

Posterior Norm Control in Hungary after the Abolition of Actio Popularis

> *"The commission of the Constitutional Court cannot be judged alone, based only on the statutory list. The determinant factor is the method of the commission's practice, and it depends on a lot of legislative condition and on the purpose of the court."*[1]

1. INTRODUCTION

Act No. XXXII. 1989 on the Constitutional Court, which came into force on 30th October 1989, called an institute to life which had not had previous model in our public law arrangement. Previously, the Administrative Court (founded on 1st January 1897) had provided constitution-jurisdiction part functions, and after that the Constitutional Law Council, which was attached to the Constitutional Law in 1983, evoked in 1984, but none of these organizations were a concrete constitutional balance of the Parliament.

The Hungarian Constitutional Court (hereinafter referred to as CC) became more than a constitutional balance because of its activism in the early years; it determined the developmental direction of legal fields with certain decisions, and it contributed to the

[1] SÓLYOM, LÁSZLÓ: *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginning of Constitution-jurisdiction], 1999, Osiris Kiadó, Budapest, 163.

expansion of the previous contents of many constitutional institutions as well. The institution of actio popularis rendered indispensable assistance for this, which made the CC suitable for removing anti-constitutional legal sources from the Hungarian legal system, and it provided the opportunity to take actions against the new rules, which were in opposition with the idea of constitutionality.

However, there were many critiques against the CC's practice and also against actio popularis. According to Gábor Halmai, the CC overrode its commission in many cases, and they interpreted laws in force to everybody[2] instead of the Constitution, while Tamás Lábady said that the 'blindly torpedoed popular petitions'[3] created gaps in many cases in the legal system. Beyond this, the institution of actio popularis causes a large amount of cases. Also, it was phrased as critique that the CC missed the authority of proposing concrete norm control.

The Fundamental Law, which was accepted in 2012, and the new Constitutional Court Act (hereinafter referred to as New CC Act) remedied this insufficiency and summoned the real institution of constitutional complaints. Because of the abolition of the actio popularis special constitutional complaints and the actions of Ombudsman were also included into the regulation. The increase of the authority taxation – as László Sólyom explicated[4] – does not automatically mean authority increase because it is influenced by regulatory environment as well as the self-understanding of judges in association with authorities. Because of that, it is questionable whether the newly created system can serve the constitutional state as effectively as the previous one. The other pending question is

[2] HALMAI, GÁBOR: Hans Kelsen és a magyar Alkotmánybíróság [Hans Kelsen and the Hungarian Constitutional Court], in CS. KISS, LAJOS (ed.): *Hans Kelsen jogtudománya* [Jurisprudence of Hans Kelsen], 2007, Gondolat Kiadó, Budapest, 480.

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[4] SÓLYOM: *op. cit.* 163.

whether the actions of Ombudsman and the special constitutional law complaints can be capable of substituting actio popularis, or the abolition of the institute would cause irretrievable constitutional deficit.

I would like to provide answers for these questions by introducing the current Hungarian and international regulations and the recommendations of the Venice Commission.

2. LAW REGULATION AND CRITIQUES OF THE POSTERIOR NORM CONTROL

The laws[5] codified in 2011 brought significant changes regarding CC regulations. The regulations of the CC are in the State Organization part of the Fundamental Law. Article 24, Paragraph 2 of the Fundamental Law – not exhaustively, but with stating the main authorities – establishes that the other tasks and authorities can be provided by the Fundamental Law and the cardinal only Acts to eliminate authority problems of the Constitution which allowed for surplus laws to give or revoke authorities from the CC.[6]

The list of authorities was contributed with the institute of real constitutional complaint. With this, the constituent provided the opportunity for the citizens to take actions against anti-constitutional judicial decisions. Besides, the constituent marked the followings as conditions: "*the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her"*[7], in addition: "*the CC shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance."*[8] The principal constitutional law issues like minimal admission were not determined, the CC judges the applications included in bills from

[5] It applies to the Fundamental Law and the New CC Act.
[6] The Fundamental Law of Hungary, Art. 24. para. (2) point g).
[7] Act CLI of 2011 on the Constitutional Court Art. 27. point b).
[8] New CC Act, Art. 29.

case to case. In my opinion the CC should explicate what this admission criterion means – even in adjudication. It would be necessary because of three reasons: (1) The rule for the CC's procedure determines it as a base case of challenge;[9] (2) within the meaning of Art. 28 of the New CC Act it had to be applied in the case of every citizen complaint [also in the case of constitutional complaints based on Art. 26 para. (1)-(2)]; (3) it had to be predictable for citizens that the CC would accept their complaint. The difficulty of judging this criterion can be indicated by the fact that the CC has not been able to establish a unified, debate-free practice in the last nearly one and a half years, as in rejecting complaints the contents of minority opinions[10] and parallel explanations[11] are demonstrating the lack of consensus. Béla Pokol's and Péter Paczolay's minority opinions are very important from these, which perfectly reveal the previously explained problems. According to Béla Pokol's standpoint, the court violates the criminal law's nullum crimen sine lege principle and Article XXVIII., Art. 4 of the Fundamental Law as well, when they extensively interpret Art. 216 para. 1 of the Criminal Code – *Any person who vandalizes a historic monument which is in his possession, commits a felony offense* – with punishing passive behaviour, hence, courts are violating principal rights, which makes the questionable applications a principal constitutional issue.[12]

Also troubling the CC's practice – which narrowly defines the admission criteria of special constitutional complaints – István Stumpf wanted to indicate this in his minority opinion when he

[9] 1/2012. (I. 3) Decision about the procedure of the Constitutional Court, Art. 30. para. 2 point a).

[10] 3227/2012. (IX. 28.) CC Decision, Minority opinion of Dr. András Holló and Dr. Miklós Lévay, 3023/2012. (VI. 21.) CC Decision, Minority opinion of Dr. Miklós Lévay, 3077/2012. (VII. 26.) CC Decision, Minority opinion of Dr. Péter Paczolay and Dr. Béla Pokol, 3264/2012. (X. 4.) CC Decision, Minority opinion of Dr. István Stumpf.

[11] 3012/2012. (VI. 21.) CC Decision, parallel explanation of Dr. László Kiss, 3074/2012. (VII. 26.) CC Decision, parallel explanation of Dr. András Holló.

[12] 3077/2012. (VII. 26.) CC Decision, Minority opinion of Dr. Béla Pokol and Dr. Péter Paczolay.

explained that the CC is causing and maintaining a constitutional deficit when it requires the factual and codified 180 days. In his opinion the situation can be remedied if the substantial chance of a legal injury was enough reason for admission, or the 180 days could be calculated from the time when the public act comes into force.[13] The Venice Commission's standpoint also highlights this in the case of Section 26 "*...an exception for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual."*[14] So the institute could realize its original purpose – the partial substitution of actio popularis – if the CC ignored these authorities' practice[15] of the German CC and rendered his authority on expanded way.

From 1st January 2012, the Fundamental Law wanted to narrow down the range of posterior norm control promoters to the quarter of the parliamentarians. The Constituent had asked for the Venice Commission's opinion before the rule was codified. In his report the Commission highlighted that "*the availability of an* actio popularis *in matters of constitutionality cannot be regarded as a European standard.",*[16] also "*the actio popularis is not requisite in a democratic state."*[17] At the same time, they recommended the initiation of another channel to the Constituent and they mentioned the Ombudsman action[18] as an example, which was included in the final version of the Fundamental Law because of this. The Ombudsman action was definitely needful against its many argued

[13] 3264/2012. (X. 4.) CC Decision, Minority opinion of Dr. István Stumpf.

[14] European Commission for Democracy Through Law (Venice Commission) Opinion no. 665/2012, Draft Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, 8.

[15] KELEMEN, KATALIN: Van még pálya (A magyar Alkotmánybíróság hatásköreiben bekövetkező változásokról) [There is still path (about the authority changes of the Hungarian Constitutional Court)], in *Fundamentum,* Vol. 15. No. 4. (2011) 90.

[16] European Commission for Democracy Through Law (Venice Commission) Opinion no.614/2011. Opinion on the three legal question arising in the process of drafting the new Constitution of Hungary, 14.

[17] Venice Commission Opinion no 665/2012. 12.

[18] Venice Commission Opinion no 614/2011. 17.

elements, because the other two petitioners are definitely political actors, so their mere petitioner existence would politically transform every CC Decisions directed to posterior norm control. In the followings I would like to introduce these channels, highlighting the corner regulation points of each channel.

The government as a constituent considered a European standard, but in my opinion it is very difficult to imagine that it initiates a procedure against a law accepted by underlying parliamentary majority, which has been proved by the practice of the last two years.

The Fundamental Law meant a sharp change compared to the former regulation, because until 2012, even a single parliamentarian could initiate a posterior norm control, while in accordance with the regulations in force an application of the quarter of the parliamentarians is required. As the table below reveals, it is only in Belgium and Austria[19] where they have more difficult procedure for parliamentarians to address the CC than in Hungary. In Germany – similarly to Hungary – the support of the quarter of the parliamentarians to initiate a posterior norm control procedure is also required. However, in Germany the governments and Constitutional Courts of the federated states can initiate the start of this type of procedure. Also, it is clearly visible that the one-fifths regulation is considered as a European standard. In Hungary the problem is that it is hardly imaginable in the case of two-thirds parliamentary majority that members of the opposition can stand into a camp to have the necessary quarter of the mandates, so it seems like a sleeping institution. This confirms that *„the government's politican merger with the legislative power is a fact also admitted by the CC."*[20]

[19] Where the governments of federal provinces and the CC can initiate a process ex officio.

[20] SMUK, PÉTER: A politikai zsákmányelv alkotmányos korlátai [The Political Principle of Booty's Contitutional Limitations], in *Jog-Állam-Politika*, Vol. 2. No. 4. (2010) 7.

Required mandates for posterior norm control		
Examined country	***Required rate or mandates***	***%***
Hungary[21]	1/4	25
Belgium[22]	House of Commons 1/3	33
Ukraine[23]	45	10
Slovak Republic[24]	1/5	20
Lithuania[25]	1/5	20
Latvia[26]	20	20
Poland[27]	Szejm 50, Senate 30	10,8 & 30
Czech Republic[28]	House of Commons 41, Senate 17	20,5 & 21
Bulgaria[29]	1/5	20
FR of Germany[30]	1/4	25
Austria[31]	1/3	33
Spain[32]	Congress 50, Senate 50	14,3 & 19

1. table (edited by the author)

After the effective date of the Fundamental Law it was actually the Ombudsman Channel which was active but in that case the legislator made a mistake in that he did not regulate the mode of the authority's practice. Therefore, this task is the actual commissioner's duty. The possible forms of interpretations are: (1) postman role, (2)

[21] The Fundamental Law of Hungary, Art. 24. para. (2) point e).
[22] Constitution of Belgium, Art. 4.
[23] Constitution of Ukraine Art. 150.
[24] Constitution of Slovak Republic Art. 130. para. (1).
[25] Constitution of Lithuania Art. 106.
[26] Constitutional Court Act of Latvia Art. 17. para. (1).
[27] Constitution of Poland Art. 191. para. (1) point a).
[28] Constitutional Court Act of Czech Republic Art. 64. para. (1).
[29] Constitution of Bulgaria Art. 150.
[30] Constitution of Federal Republic of Germany Art. 93. para. (1).
[31] FAVOREU, LOUIS: Az alkotmánybíróságok [Constitutional Courts], in PACZOLAY, PÉTER (ed.): *Alkotmánybíráskodás, alkotmányértelmezés* [Constitution-jurisdiction, Constitution-interpretation], 1995, ELTE, Budapest, 75.
[32] Ibid. 113.

narrowly or (3) widely interpreted authority. The postman role would be unreasonable from many viewpoints. At first, the New CC Act's ministerial explanation concludes that "*... a commissioner's application cannot mean the transmission of the incoming complaints, which would mean the return of the annulated authority of actio popularis into the legal system."*[33] In addition "*... the transmission of these complaints without any filter is a legal nonsense... primarily not... the preservation of the ombudsman's professional prestige justify..."* but *"the adopted applications with conflicting content are forcing the institute into a schizophrenic situation."*[34]

In the case of the narrowly interpreted authority the ombudsman's action would not be more than a concrete norm control. Although, it would not mean that an ombudsman's act in his original function, or being detached from a concrete case could not initiate a posterior norm control procedure – according to the Venice Commission's standpoint it is considered as a European standard that in Europe it is only in Estonia and Ukraine where widely authorized ombudsman institute exists.[35] However, this is the only channel which is useable for citizens to initiate posterior norm control, so it is necessary that the ombudsman can widely interpret his authority. However, it has many problems as well; the first I would mention is that "*ombudsman has discretion in terms of the method of managing complaints asking for posterior norm control procedure."*[36] But it could offend citizens' ideological freedom in many cases; just think of euthanasia or abortion.

[33] The Minister's Explanation of the New CC Act, 26.

[34] LÁPOSSY, ATTILA: Popularis akcióból ombudsamani akció? [Ombudsman action from a popular action?], in *Magyar Közigazgatás*, Vol. 1. No. 3. (2011) 121.

[35] Venice Commission Opinion no 614/2011. 17.

[36] LÁPOSSY, ATTILA: Közvetve és közvetlenül: az alapvető jogok biztosának indítványozási jogköre az alkotmánybíráskodás és alapjogvédelem szemszögéből [Directly and indirectly: the initiative authority of the Commissioner for Fundamental Rights from the aspects of constitution-jurisdiction and fundamental law protection], in *Kodifikáció és közigazgatás*, Vol. 1. No. 2. (2012) 41.

But beyond the ombudsman's discretion it is also necessary for citizens to know the cases which could be interiorized by the institute. That is why they created those aspects (in the shape of normative orders) which make the initiation of the posterior norm control reasonable. These aspects are reasonable if "*(1) constitutionally qualm raises related in the enforcement of fundamental rights, constitutional principles and claims determined in the Fundamental Law, (2) there is an injury in the fundamental rights of people in particularly protected groups or there is an injury in the right for healthy environment (3) extreme weight in the violence of fundamental rights, (4) the number of injured people justify it"*.[37] These aspects give enough insight for the citizens and the future ombudsman, so they can predict the correct handling of a petition. But this is a legislative instruction, so it also depends on the Commissioner of Fundamental Rights whether he feels it normative or not. Because of this, I consider it necessary to legally regulate the method of practicing this authority, even by the takeover of ombudsman's instructions, as this institution is not capable of building a constitutional control on it because of the lack of guarantee rules – even if it seems that they interpret their role as I have written above.

The other significant problem is the question of the compatibility of ombudsman's action and the principle ombudsman tasks, because the previous authority is only an additional license but it could implicate that the completion of his main tasks is disturbed. According to Attila Lápossy, the ombudsman action in the aspect of the main functions of the Commissioner for Fundamental Rights is *"official and public service legal practice, compared to the examination of activities based on complaints is an additional, incremental license"*.[38] If we examine the statistics, we can see that there were 324[39] incoming posterior norm control applications to the

[37] The 7th section of the 2/2012 (I. 20.) Commissioner of Fundamental Rights directive about the professional rules and methods of the CFR's examination.
[38] LÁPOSSY: *op. cit.* (2012) 5.
[39] Report of the ombudsman.

ombudsman until 15th July 2012, but there were 466[40] to the CC (thereof 413 constitutional complaints). So it is clearly visible that half of the entire cases were transferred to the Fundamental Rights. From the statistics it is also obvious that only the ombudsman initiated posterior norm control procedure in 2012, which confirms the inactivity of the other two channels. "*The petitioner's loneliness is regrettable, because the involving of other technically prepared petitioners would effectively increase the authorities' accessibility."*[41]

I would like to determine these potential petitioners' range with an outlook to the regulation of foreign countries. It can be definitely stated that there are no more channel models in Europe than the model established by actio popularis, but it has to be considered that Poland – where the similar system is missing – provides the same number of access. As illustrated, the current model is situated in the lower regions, even Romania has less channels than Hungary (the prosecutor and the court forms a channel in the table), but the range of the posterior norm control's initiators is very wide (7 accessibility channels). However, in the Czech Republic, where also three channels are available, one of them is the ex officio, so the CC can initiate his process. There is one more channel in Germany and Austria but this number covers a much higher quality, because in these countries the federal governments are forming powerful constitutional balance with their possibility to turn for the CC, moreover, in Austria the CC has the right to officially conduct such procedures. The case of Slovakia is different, because a self-government organization cannot turn to the CC there, but the President of the Supreme Committee and the Supreme Prosecutor can do it, so the members of the legislation can initiate a process easier. The number of accessibility channels is extremely high in Poland, Bulgaria and Latvia. In these countries the local governments, the President of the Supreme Committee, the Supreme Prosecutor and the ombudsman can also initiate a procedure.

[40] Statistics of the CC's available at: http://www.mkab.hu /letoltesek/ stat_2012_1fev.pdf [cit. 2013-11-04].
[41] LÁPOSSY: *op. cit.* (2012) 40.

The table's data shows that the possible channels are: (1) ex officio; (2) President of the Republic; (3) Leaders of the judiciary's supreme organisation; (4) Local government organization. This four can be found in most of the European countries as posterior norm control initiators, and these can be considered as European standards. Sometimes it occurs that one of them is missing but they try to replace it with a more powerful channel (for example ex officio). In Poland the civil sector (churches, trade unions in the cases affected to them) also appears among the initiators, however, in a limited way. The ex officio suggestion would not be a good idea in Hungary because the CC suffered from critiques due to their activism in the 90s, so they probably would not undertake the critiques associated with this authority. The President can be a possible solution, but one of his primary duties is to establish the national unity, so he should not have to make political decisions. However, it would be a realistic channel if the High Court and the Supreme Prosecutor had possibility to initiate in relation to their authority and function. Similarly, the local governments' possibility for posterior norm control would be a good solution.

In March 2013, the Fundamental Law – realizing this fact – expanded the petitioners' range with the President of the High Court and the Supreme Prosecutor. He wanted to remedy the problems outlined above so that "*the judiciary can fulfil its constitution-protective role better.*"[42] This modification was welcomed because the new channels can decrease the ombudsman's occupation and can make the protection of the Fundamental Law better guaranteed. However, in my opinion they had to record that a norm control could be initiated in accordance with functional and jurisdictional issues only, because it would not be fortunate if the two initiators were attacked from political circles, accusing them with partiality of a political faction. I think the range of initiators would be complete if the local governments could initiate a posterior norm control in accordance with cases related to their authority. The ombudsman's occupation could be decreased if the civil sector was involved in the range of initiators, even following the Polish example with the

[42] Explanation of the Fundamental Law's fourth modification, 23.

provided possibility of initiation to churches and trade unions (of course in issues accordance with their case only). But it should be noted that in Hungary the trade union movement is not as powerful as it is in Poland. In the case of churches the fact that their approved ecclesial existence depends on parliamentary confirmation could limit their activity in these situations.

The development of accessibility channels in the aspect of posterior norm control									
	C[43]	PR[44]	G[45]	P[46]	O[47]	EX[48]	PH-SP[49]	OLC[50]	∑[51]
Poland[52]	+	+	+	+	+	-	+	+	**7**
Bulgaria[53]	-	+	+	+	+	-	+	+	**6**
Latvia[54]	-	+	+	+	+	-	+	+	**6**
Ukraine[55]	-	+	-	+	+	-	+	+	**5**
Slovakia[56]	-	+	+	+	+	-	+	-	**4**
Austria[57]	-	-	-	+	-	+	+	+	**4**
Germany[58]	-	-	+	+	-	-	+	+	**4**
Czech Republic[59]	-	+	-	+	-	+	-	-	**3**
Lithuania[60]	-	+	-	+	-	-	+	-	**3**

[43] C: Civil.
[44] PR: President of the Republic.
[45] G: Government.
[46] P: Parliament.
[47] O: Ombudsman.
[48] EX: Ex officio.
[49] PH-SP: President of the High Court – Supreme Prosecutor.
[50] OLG: Organs of the local government.
[51] ∑: Number of the Access Channels.
[52] Constitution of Poland Art. 191. para. (1) point a).
[53] Constitution of Bulgaria Art. 150.
[54] Constitutional Court Act of Latvia Art. 17. para. (1).
[55] Constitution of Ukraine Art. 150. para. (1).
[56] Constitution of Slovak Republic Art. 130. para. (1).
[57] FAVOREU op. cit. 75-76.
[58] Constitution of Federal Republic of Germany Art. 93. para. (2).
[59] Constitutional Court Act of Czech Republic Art. 64. para. (1).

Hungary[61]	-	-	+	+	+	-	-	-	**3**
F. Law Modification 4[62]	-	-	+	+	+	-	+	-	**4**
Romania[63]	-	-	-	+	-	-	+	-	**2**

1. table (edited by the author)

3. SUMMARY

Through the institute of actio popularis the CC (established in 1989) seemed to have the full scale of continentally known constitutional authorities. But this authority taxation was not complete because there was not any possibility for citizens to turn to the CC in the case of their individual law injury. Because of this the institute was one-sided regarding the jurisdiction side. The solution could be the establishment of the German-type institution of constitutional law complaints.

The Fundamental Law healed this one-sidedness of authority, at least in the aspect of taxation. But in practice it became one-sided again in the aspect of the CC's authority. In practice this one-sidedness was caused by the small number of posterior norm control's initiators and the regulations obliged on them. To try to heal this problem, in February 2013, the Constituent introduced two new channels, but in practice there was no essential change because the rules applying to the other three channels were not modified. In the new regulation entering into force in 2012, it was salutary that the Fundamental Law stated the CC's authorities, and a public act, which was on lower level than the cardinal law could not give or revoke authority to the CC.

The special constitutional complaint is what the legislator dedicates to substitute actio popularis but the CC narrowly interprets the admission procedure's rules (following the German

[60] Constitution of Lithuania Art. 106.
[61] Fundamental Law of Hungary, Art. 24. para. (2) point e).
[62] Fundamental Law's fourth modification.
[63] Constitution of Romania Art. 146.

Constitutional Court's practice in similar cases), so the institute is inappropriate for the purpose the legislator meant. As István Stumpf highlighted that in his minority opinion, the legal institution can only reach the desired purpose if it is more easily interpreted – no need for direct legal injury, or the 180 days time limit had to be counted from the date when the public act comes into force. The modification of the petitioners' range of posterior norm control is one of the most argued parts of the new regulation, because with the abolition of actio popularis the legislator determines the possible petitioners' range very narrowly. Based on the international practice, this regulation is an accepted European standard, but in my opinion it would be a better solution to introduce a filter mechanism in the first round and eliminate the institute definitively when the amount of the incoming applications to the CC is unmanageable. In the current regulatory environment the best solution would be the involvement of new channels.

In my opinion to solve these defects, the regulation should be modified in the following ways: (1) The special constitutional complaints should be regulated as the chance of legal injury was enough to accept the application, and the 180 days time limit had to be counted from the date when the public act comes into force. (2) The legislator should re-control the regulations related to posterior norm control petitioners in accordance with the following: a) The ombudsman's initiative authority has to be incorporated into a law; b) Decrease the number of parliamentarians who have the right of initiation from one-fourth to one-fifth; c) Expand the range of petitioners to the local governments in issues affecting their authority; d) Modify the President of the High Court and the Supreme Prosecutor's initiative authority for that they can turn to the CC in issues related with their task or authority, because in other cases their application could get a political tone. With these steps the problems named in this study could be remedied.

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[2] Fundamental Law's fourth modification.
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[4] Constitution of Belgium.
[5] Constitution of Bulgaria.
[6] Constitutional Court Act of Czech Republic.
[7] Constitution of Federal Republic of Germany.
[8] Constitutional Court Act of Latvia.
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[2] 3077/2012. (VII. 26.) CC Decision, Minority opinion of Dr. Béla Pokol and Dr. Péter Paczolay.
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[6] Explanation of the Fundamental Law's fourth modification.
[7] The 7th section of the 2/2012 (I. 20.) Commissioner of Fundamental Rights directive about the professional rules and methods of the CFR's examination.

Barna Arnold KESERŰ

Review on the Role of Green Technologies in Hungarian Policies Concerning Sustainability[1]

1. INTRODUCTION - WHAT IS SUSTAINABLE DEVELOPMENT?

In the last years and decades the concept of sustainable development has progressively come into the foreground, which resulted in that sustainable development is an inevitable common pillar of technical, economic and social sciences. Sustainable development is a goal and also a tool in the scope of the welfare of human mankind. This paper would like to lighten up some cornerstones of the Hungarian regulation regarding sustainable development. Furthermore, the study focuses on green innovation[2] and green technology, and introduces key Hungarian action plans and national strategies concerning sustainable development.

[1] This research was supported by the European Union and the State of Hungary, co-financed by the European Social Fund in the framework of TÁMOP-4.2.4.A/ 2-11/1-2012-0001 'National Excellence Program'.

[2] Under the term innovation this study means the Schumpeterian interpretation, i.e. such new combination of existing materials and forces in the economy which create new consumer demands and habits. In this sense, innovation is not a response for demand because it is so new that it basically changes our needs. Innovation alters our values what we have already got used to. Schumpeter defines five territories of innovation: (1) new goods or improvement quality of existing goods, (2) new processes in the industry, (3) new market, (4) conquering new resources independently from their previous existent and (5) establishment of a new organization. See SCHUMPETER, JOSEPH A.: *A gazdasági fejlődés elmélete* [The Theory of Economic Development], 1980, Közgazdasági és Jogi Könyvkiadó, Budapest, 110-111.

First of all, it is worth mentioning briefly why green technology and protection of the environment is important within the concept of sustainable development. From 5th to 16th June 1972, United Nations Conference on the Human Environment was held in Stockholm, which was the first international summit where issues regarding protection of the environment were in the foreground. The result of the conference was the adoption of The Stockholm Declaration on the Human Environment, consisting of 26 principles connecting to the environment.[3] At the same time, the United Nations (hereinafter: UN) created the United Nations Environment Program (UNEP), the main task was the protection of human environment through global supporting programs. These were the first steps in the path of the concept of sustainable development; however, the notion itself was created later.[4]

The idea of sustainable development was born in the context of ecological and economic interdependency. In 1980 – as the result of cooperation of more UN agencies –, the World Conservation Strategy was accepted, which served to redefine environmentalism in the post-Stockholm era. The strategy recognized that environmental issues needed long-term actions and solutions, and environmental and developmental objectives were strongly bounded.[5] The World

[3] *See* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 [cit. 2014-01-04].

[4] CARROLL, ELLIE: Twenty-five Years in the Making: Why Sustainable Development Has Eluded the U.N., And How Community-driven Development Offers the Solution, in *Houston Journal of International Law*, Vol. 32. Issue 2. (2010) 549.

[5] BRAGDON, SUSAN H.: The Evolution and Future of the Law of Sustainable Development: Lessons from the Convention on Biological Diversity, in *The Georgetown International Environmental Law Review*, Vol. 8. Issue 3. (1996) 423. As section 2 of the strategy says: "Humanity's relationship with the biosphere (the thin covering of the planet that contains and sustains life) will continue to deteriorate until a new international economic order is achieved, a new environmental ethic adopted, human populations stabilize, and sustainable modes of development become the rule rather than the exception. Among the prerequisites for sustainable development is the

Charter of Nature had the same conclusion in 1982, which declared that natural resources should be exploited in a way that the optimum sustainable productivity could be achieved and maintained on a permanent level.[6]

The four years between 1983 and 1987 were crucial from the perspective of creating the notion of sustainable development. In 1983, the UN General Assembly adopted Resolution Nr. 38/161., which set up the World Commission on Environment and Development (WCED) led by Gro Harlem Brundtland, Prime Minister of Norway.[7] The main task of the commission was to make long-term propositions (to the year 2000 and beyond) for the UN about environmental strategies for achieving sustainable development and to promote interrelationships between people, resources, environment and development.[8] The first meeting of

conservation of living resources." *World Conservation Strategy*, 1980, International Union for Conservation of Nature and Natural Resources, available at: http://data.iucn.org/dbtw-wpd/edocs/WCS-004.pdf [cit. 2014-01-04].

[6] DANAHER, JOHN: Protecting the Future or Compromising the Present?: Sustainable Development and the Law, in *Irish Student Law Review*, Vol. 14. Issue 1. (2006) 118.

[7] Therefore, the commission is often referred to as the Brundtland Commission. Setting the Commission up was necessary because of the huge global changes in the world. Prior to 1983, the pollution had been continuously increasing, the overpopulation had been gathering speed and the scissor between poor and rich countries had been opening unstoppably wider. These problems could be caused by the industrialization of developed countries. However, they were not isolated problems because of global interdependency they required (and requires also nowadays) global solutions. No one could expect from the developing countries to give up their development because the developed countries in the "northern fortress" had been exploiting and partially destroying the Earth which could not bear any more developed countries. *See* BRUNDTLAND, GRO HARLEM: Taking Stock of Sustainable Development at 20: What We Have Accomplished and What Comes Next? in *Pacific McGeorge Global Business & Development Law Journal*, Vol. 21. Issue 2. (2008) 155.

[8] CARROLL: *op. cit.* 550.

WCED was held in 1984, and after 900 days of work (which included such environmental disasters like the 1986 Chernobyl catastrophe) the widely known report of the commission, entitled Our Common Future had been published in 1987. One of the greatest achievements of the report is to set up the first notion of sustainable development. The report says "humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."[9] The two key factors of the notion are needs (primarily, the needs of poor people), for which unconditional priority should be ensured and the idea of limitations called upon by technological advancement and the society to maintain the ability of environment to satisfy the needs of humanity.[10]

The notion of sustainable development does not explicitly cover the protection of the environment or the sparing, preserving and effective use of natural resources; however, it implicitly contains these meanings, as well, due to the fact that future generations can only receive natural resources of the Earth if contemporary generations use them effectively and economically.[11]

[9] A/42/427, Our Common Future: Report of the World Commission on Environment and Development, From One Earth to One World, section 27., available at: http://www.un-documents.net/ocf-ov.htm#I.3 [cit. 2014-01-05].

[10] GELLÉRTHEGYI, ISTVÁN: A környezetvédelem nemzetközi szabályozásának fejlődése [The Development of the International Regulation of the Environmental Protection], in *Pro Publico Bono Online TÁMOP Speciál,* 2011. Available at: http://www.propublicobono.hu/pdf/GELL%C3%89RTHEGYI%20ISTV%C3%81N%20A_k%C3%B6rnyezetv%C3%A9delem%20...%201.pdf [cit. 2014-01-05].

[11] The concept of sustainable development by the Brundtland Commission focuses on humankind. Therefore, Brundtland suggested investing itself in humanity through fighting off poverty and increasing the level of education and healthcare. *See* BUGGE, HANS CHRISTIAN – WATTERS, LAWRENCE: A Perspective on Sustainable Development After Johannesburg on the Fifteenth Anniversary of Our Common Future: An Interview With Gro

The next fundamental milestone in the history of sustainable development was the United Nations Conference on Environment and Development (UNCED), or as commonly called, Earth Summit, held in Rio de Janeiro in 1992, where 176 states gathered together.[12] The conference adopted – among other relevant documents – the Rio Declaration on Environment and Development and Agenda 21. In these documents member states emphasized that the idea of sustainable development is able to give a solution for social and economic crises in the world: opposition between north and south, unsustainable economies, climate change, lessening biodiversity, destroying rainforests and similar global cataclysms. This way the idea of sustainability pervaded the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, which were also signed in Rio. The Rio concept of sustainable development is strongly anthropocentric, which was openly opposed by the NGO Global Forum, – a conference held by non-governmental organizations at the same time as Earth Summit – and in the adopted Earth Charter they explicitly denied this human-centric (or anthropocentric) approach. According to their opinion, humanity is not the center of life but a component of nature and Earth, only the part of these.[13]

Half of the 27 articles of the Rio Declaration contain the words 'sustainable development' but it did not give a new definition. From

Harlem Brundtland, in *The Georgetown International Environmental Law Review*, Vol. 15. Issue 3. (2003) 363-364.

[12] The early 1990's brought an interesting and very intense debate about the connection of trade and environment protection. The effects of the work of Brundtland Commission and the forthcoming UNCED with the simultaneously running GATT revision made a fertile soil to ensure the implementation of environmental aspects in the economy and trade. In more detail see: HORVÁTHY, BALÁZS: Környezetvédelmi szempontok integrálása a WTO szabályozásába [The integration of environmental aspects into the regulation of WTO], in *Állam és Jogtudomány*, Vol. 54. Issue 3-4. (2013) 98.

[13] BOSSELMANN, KLAUS: Rio+10: Any Closer to Sustainable Development? in *New Zealand Journal of Environmental Law*, Vol. 6. (2002) 302.

the "spirit of Rio" one can derive that the concept of sustainable development links together rich and poor countries through their common interests in maintaining an ecologically sustainable economic system because only this can ensure the needs of future generations. It tries to lay a bridge between environmentalism and economic growth.[14]

As the corollary of the Earth Summit, the international regulation of environmentalism got a boost by the end of the 1990s; however, around the Millennium states realized that the aims of the Rio conference did not succeed, the world was still fighting against enormous poverty, unsustainable lifestyle and degradation of environment. In addition, the gap between rich and poor countries was getting wider. These problems called upon the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002, its main task was to strengthen the institutional background of sustainable development.[15] Two relevant documents were adopted under the aegis of the conference – the Johannesburg Declaration and the Plan of Implementation –, which, on the one hand, reconfirmed the Rio obligations, on the other hand, emphasized societal aspects of sustainable development which founded the three-pillar model of sustainable development that stands on the economy, society and the protection of the environment.[16]

Between 20 and 22 June 2012, the United Nations Conference on Sustainable Development (UNCSD) was held, which also referred to Rio+20 because it was also held in Rio de Janeiro, 20 years after

[14] BRYNER, GARY C.: Policy Devolution and Environmental Law: Exploring Transition Towards Sustainable Development, in *Environs, Environmental Law and Policy Journal*, Vol. 26. Issue 1. (2002) 10.

[15] BEYERLIN, ULRICH: Strengthening International Governance for Sustainable Development: Expectations for the 2002 Johannesburg World Summit, in *Potchefstroom Electronic Law Journal*, Vol. 5. Issue 1. (2002) 1.

[16] This tendency was totally against the anti-anthropocentric ideology of the Earth Charter. For the Hungarian extending of the three-pillar model *see* footnote 65.

the Earth Summit, as a 20 years follow-up measure. The main aim of the conference was to bring the widest circle of international policymakers together again to shape how the world can reduce poverty, advance social equity and ensure environmental protection on an ever more crowded planet to get we want in the future. The conference focused on two themes: i) green economy in the context of sustainable development, poverty eradication and ii) institutional framework for sustainable development. Within these themes, seven priority areas were identified like decent jobs, energy, sustainable cities, food security and sustainable agriculture, water, oceans and disaster readiness. The main outcome document of the conference is entitled "The Future We Want", within which member states renewed the commitment towards sustainable development and ensured the promotion of an economically, socially and environmentally sustainable future for our planet, and for present and future generations.[17] The document contains 283 sections, and among many other points it details why green economy and green technology are important and how we can use them as tools to achieve sustainable development.[18]

2. GREEN ECONOMY IN HUNGARIAN POLICIES

2.1. Sustainable development as a constitutional requirement

On 18th April 2011, the Hungarian Parliament adopted the new constitution, called Fundamental Law, which came into effect on 1st January 2012. It has more commitments towards green economy and the protection of the environment under the aegis of sustainability. The first part of the Fundamental Law is the National Avowal, which

[17] This wording still refers to the definition of Our Common Future, as the Brundtland Commission defined sustainable development.

[18] The wording of The Future We Want is quite different from the previous texts, it uses an intellectual or emotional layer, concentrate on the individual activity. This is a key factor and alteration from the previous periods (where – more or less – the states recieved special duties and tasks).

says "We commit to promoting and safeguarding our heritage […] with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources." This statement refers to the definition of sustainable development created by the Brundtland Commission. The legal nature of the National Avowal is controversial; however, Article R (3) of the part entitled Foundation prescribes that provisions of the Fundamental Law shall be interpreted in accordance with the National Avowal. This way it has legally binding nature (as an interpretative tool).

Article P, however, means a clear commitment towards sustainable development: "Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations." This provision ennobles environmental protection to a constitutional value. Through Article 30. (3), it gets an institutional protection from the Deputy of Commissioner of Fundamental Rights whose duty is to protect the interests of future generations.

From the aspect of human rights, Article XXI. (1) creates an obligation to recognize and ensure right to everyone to a healthy environment. The right for healthy environment is different from the other classic human rights and social rights because it has a special subject what makes it a typical third generation human right. However, it does not mean that it would be a mere state aim or declaration without legal binding. The right for healthy environment is primarily an individual protection of legal instrument, videlicet a special human right which determining side is the objective legal aid. According to the interpretation of the Constitutional Court [Decision 28/1994. (V. 20.)], the right for healthy environment means a state obligation to take the necessary provisions in order to protect the environment. However, the level of protection is not arbitrary, legal protection cannot be reduced just increased. The only exception is

when reducing is inevitable for the protection of other human rights but proportionality is always a condition.[19]

The last relevant provision in the Fundamental Law is Article 38. (1), where the Parliament declared that management and protection of national assets shall aim at serving public interest, meeting common needs and preserving natural resources, as well as taking the needs of future generations into account. This sentence establishes the financial background and obligation to enforce environmental protection.

2.2. National Sustainable Development Strategy

As described above, it is now understandable how environmentalism became more and more important and how the issues of green economies and green technologies had come into the center of sustainable development. The commitments in the aforementioned legally binding treaties and non-binding declarations were taken onto international level, most of it as soft law instruments but the execution of these commitments demands global, regional and local actions. The network of thousands of local actions – coordinated on regional and global levels – is only able to achieve the appointed developmental goals. The commitments in Fundamental Law are in harmony with these legal documents; however, they make a clear obligation to enhance the legal regulation. The results of these obligations are numerous strategies and action plans, the most important of them are introduced in this paper.

In the last seven years there were more strategies and action plans in Hungary (under different governments) which focused on the accomplishment of these developmental goals through regulating and facilitating the use of green technologies.

The first remarkable step was the National Sustainable Development Strategy (shortly NSDS), adopted in June 2007. The strategy is a long-term framework that integrates more domestic sectors, so it is coherent with the goals of sectoral strategies and

[19] SÁRI, JÁNOS – SOMODY, BERNADETTE: *Alapjogok* [Fundamental Rights], 2008, Osiris, Budapest, 317-322.

programs. NSDS consists of four main parts: i) the first is an introductory part about the concept of sustainable development, ii) the second is the analysis of the contemporary situation, iii) the third contains the priorities, goals and tasks, and iv) the fourth is about the overarching tasks and means of implementation.

From the scope of green economy, the analysis of the domestic processes and measures has two core elements: environment and economy. Within the part of environment, the current situation of air pollution, land use, state of soil, surface waters, drinking water, wastewater, waste, man-made environment, natural values, biodiversity and climate change were analyzed. The analysis identified urgent and serious problems only in a few areas. One of these is that apart from large towns and main transport junctions, air pollution has diminished but motorization has increasing impacts. The proportion of the areas withdrawn from agricultural use and built up has substantially increased in the previous decade.[20] There are also worried words concerning man-made environment which condition has permanently been declining and historical architectural values of Hungary are particularly endangered. Increasing problems are caused in municipalities by rising emissions of certain air pollutants from transport congestions, the increase of noise and vibration loads, as well as the shortage of green areas.[21]

After 1990, the structure of economy has changed, which resulted in the degradation of heavy industries and mining. This tendency has a huge beneficiary impact on the environment, the later increasing volume of industries – because of economical and industrial modernizations and new environmental regulations – did not bring such a big pollution like it had been before 1990, and previous environmental threats had ceased. The general goal of

[20] The agricultural land shrank by 300 000 hectares between 1994 and 2004. *See Nemzeti Fenntartható Fejlődés Stratégia* [National Sustainable Development Strategy], June 2007, Government of the Hungarian Republic, 20., available at: http://www.nfft.hu/dynamic/national_sustainable_development_strategy.pdf [cit. 2014-01-07].

[21] Ibid. 20-24.

segregating economic growth from increasing environmental loads was apparently accomplished.[22]

The structure of the use of sources of energy has altered in Hungary since the change in the political system. Natural gas consumption has increased but the use of energy-efficient technologies has slowly increased. Hungary consumes significantly less per-capita but regarding the unit of GDP, it consumes significantly more energy than developed countries. The rate of use of renewable energy sources is low but shows increasing tendency. Before the adoption of NSDS in 2003, it had been 3,6 %, in 2005 in turn it was 5,2 %, comparing to the overall energy utilization.

The analysis emphasizes that Hungarian progress is worthy of international recognition in the area of environmental protection in relation to transportation; however, it still goes together with an increasing rate of air-pollution.

The analysis has a bad picture regarding green technologies. It says:

> Production and consumption of product and services meeting sustainability requirements began in Hungary after the change in political system in the mid-1990's, but no material progress has been observed to date, despite the fact that Hungary has substantial reserves for organic farming, given its good agricultural resources and indigenous livestock varieties. The low level of environmental awareness among residents and the low incomes of large groups of the population (leading to a price-sensitive consumer behavior) coupled with large supplies of cheap mass product prevent environment-friendly product from becoming more popular and from making up increasing proportions of product available in shops.[23]

The institutional framework for eco-friendly products and services was created by the domestic environmental policy but without

[22] Ibid. 24.
[23] Ibid. 28.

significant resources the results were not realized. However, as NSDS says, it was the same situation in most European countries.

The final relevant statement in this field is that prices of natural resources do not sufficiently reflect their scarcity and the cost of their ecological impacts.[24]

NSDS defines eleven priorities that are necessary to fight against the identified tendencies which undermine sustainable development. Connecting to green economy, the fourth priority is the protection of natural values, the fifth is combating climate change, the sixth is sustainable water management, the eighth is the strengthening of sustainable production and consumer habits, the ninth is the transformation of energy economy in Hungary, and the eleventh is sustainable economic regulation. The fourth, fifth and sixth pertain to the preservation of the carrying capacity of the environment and the eighth, ninth and eleventh pertain to the development of the economy.

It is a core aim to preserve the viability of natural ecosystems. This requires the preservation of biological diversity (see the Rio Convention) and the sustainable use of natural resources. Five fields of action were identified. Firstly, it is necessary to actively protect our natural values, which can be done through proper environmental regulation, horizontal and zonal programs built upon each other. Secondly, there is a need to integrate the actors of economy with legal tools, especially in agriculture, spatial development, tourism, mining, hunting and fisheries. Thirdly, institutional protection should be strengthened by sufficient resources. The fourth factor is the change of lifestyle and attitude of society in order to strengthen environmental awareness and encourage people to adapt to

[24] In everyday political communication household overhead reduction is a key factor (it could be pivotal in the elections). But reducing the price of electricity, water, gas and heating reflects the scarcity of these resources less and less, which could lead to an unsustainable waste because people often cannot esteem cheaper things, especially when they took it axiomatic that these services will last indefinitely because in a democracy it is their basic right.

sustainable modes of life.[25] And the fifth field of action is the active contribution of the society, which requires permanent institutional communication.[26]

Climate change has effect on various fields; therefore, actions against it demand harmonized steps in many fields. The main objective is to reduce emissions of greenhouse gases into the atmosphere and to prepare for and adapt to the impact of changing weather patterns and climate. The reduction of gases involves green technology in many areas like energy consumption, construction patterns, transport needs and industrial activities. On the one hand, changes in these fields could reduce the emission of greenhouse gases and on the other hand, they could facilitate the sustainable use of non-renewable natural resources and encourage the use of renewable resources.[27]

Sustainability goals relating to waters include economical and value preserving ways of water management and preservation of waters for future generations. These goals involve water-saving and pollution-free green technologies of water use which are able to maintain the quantitative balance in artificial water circulation.[28]

Amongst the economical priorities, the first important step in the scope of this paper is the improvement of sustainable production and consumer habits. The basic statement of this part is the obligatory necessity of reducing the needs of natural resources in the field of production and consumption. This can be achieved with eco-efficient technologies and investments into ecological innovations. These factors not only help the maintenance of environmental sustainability but the achievement of competitive advantage, as well. Eco-efficient technologies are able to ensure the satisfaction of needs for consumer goods at lower environment cost. The change in the structure of economy is only one side of the coin, the other one is the change of consumer habits. In my opinion, this is a more difficult

[25] *See* supra note why realizing this aim would be so hard.
[26] *National Sustainable Development Strategy,* 38-40.
[27] Ibid. 40-41.
[28] Ibid. 41.

task. Such kind of consumer patterns should be spread which have lower needs for material input and energy. These can only be achieved with long-term supporting programs and adequate tax-management, and eco-efficient technologies should be promoted within public procurement procedures, as well. With the appropriate financial support the R&D&I sector can be shepherded towards the ecological way. It goes without saying that proper waste-management and recycling with green technologies are necessary to reduce environmental loads, as promoted measures say at NSDS.[29]

Energy issues are not only matters of supply and environment but of serious national security and competitiveness, as well. The strategy suggests altering energy management regime in a way that it enables reducing the emission of greenhouse effect gases and hunger for energy should be fed from local renewable energy sources. Of course, energy management has a huge impact on the aforementioned areas as well because economy and ecology have a strong interdependency. Green technology has in important role in energy management. Firstly, the energy-cost of production can only be reduced with cleaner and newer technologies. Secondly, energy-efficiency can be improved with primer, local energy sources[30] instead of power from the grid, what generates great losses through multiple conversations. Thirdly, better heat insulation and more energy-efficient household machines can reduce household and communal energy consumption. Fourthly, the need for energy in the private and public transport sector can be diminished with eco-friendly technologies, especially with new types of fuel like second generation bio-fuels, GTL fuels produced from biogas, experimental hydrogen fuel. The EU aims at increasing the share of bio-fuels to at least by 10 % by 2020 in transport.[31]

[29] Ibid. 43-44.

[30] For example geothermal heating, ground heat pumps, solar energy collectors, biomass utilization.

[31] *Nemzeti Fenntartható Fejlődés Stratégia* [National Sustainable Development Strategy], 46-47.

The previously introduced elements of sustainability would only be utopian ideas without proper regulations and obligatory forces. Regulation is the tool for reaching sustainability aims. As it was previously outlined, taxation is one of the most important tools. "The transformation of the taxation policy must be guided by the requirement that burdens should be focused on material and energy intensive activities, those that deteriorate the environment and harm human health. This could shift the production and consumption towards the less energy and material intensive modes."[32] In the support policy open and covert support of polluting and harmful activities must be terminated and ecologically acceptable and socially useful activities should be supported as strong as possible. The strategy promotes the wide-spread use of the word "eco-efficiency" where 'eco' refers to both economically and ecologically efficient methods. This represents the integration of environmentalism and economy under the scope of sustainable development, as it was conceptually created in the early 1990s (see above). NSDS tries to create balance between governmental intervention and corporate self-regulation; therefore, it promotes the spread of responsible enterprise concept which is the cheapest and ecologically safest solution. The creation of conditions to spread this concept requires long-term thinking but results will appear.

2.3. New Széchenyi Plan

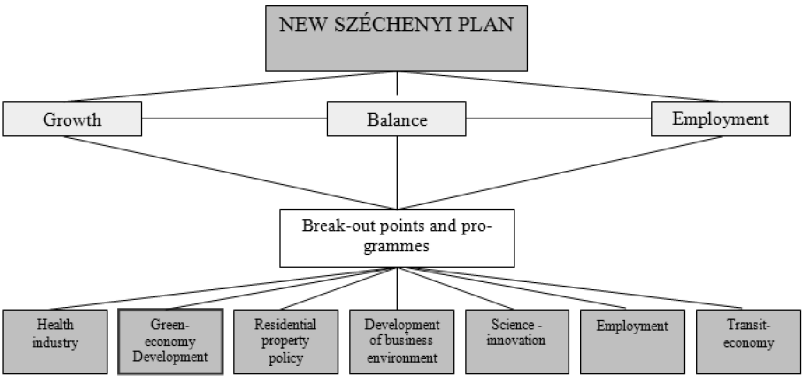
The Government of Hungary adopted the so-called New Széchenyi Plan[33] (shortly NSZP), the Development-policy Program of Recovery, Renewal and Ascension on 14th January 2011. The main objective of NSZP is to strengthen Hungarian competitiveness and

[32] Ibid. 50.

[33] The name of the plan refers to István Széchenyi (1790-1860), a Hungarian politician, theorist and writer, often called as the Greatest Hungarian. With his political and economical thoughts he determined the age of reforms in the 1820s, 1830s and 1840s. His ideas became huge successes which ascended the contemporary Hungary into the elite of the European countries.

ascension of the economy. This is an answer to the financial-economic crisis which has affected Hungary as well in the last six years. NSZP is a tool for distribution of domestic and European Union supports. At the time of writing this paper, a calculator on the official website of NSZP showed that the amount of payments got from the EU was more than 5.000 billion Hungarian Forint (cca. 16 billion Euro).

The following figure shows the system of NSZP:



1. Figure: New Széchenyi Plan, 2011, Budapest, 27.

The highlighted box shows the important part of NSZP from the perspective of this paper.

Four priorities are identified within the Green-economy Development Program:

1. green energy;
2. energy-efficiency;
3. green-education;
4. green R&D&I.

These priorities include more sublevels.

1. The basic principle of this program is the recognition of the need to change from non-renewable fossil energy-sources to alternative, renewable, principally green and clean energy-sources. This will be the basic of a new and sustainable economic model. The

Renewable Energy Road Map,[34] envisaged by 2020, includes a 20% average rate of utilizing renewable energy-sources in the EU, which inclined the Hungarian government to create this action plan on a domestic level to reach the goals defined by the EU and undertaken by Hungary, which is at least 14,65 %.[35]

The planned use of renewable energy-sources has multiple pillars like biomass, biogas, bio-fuels, geothermic and thermal energy, solar, water, and wind energy.

The subprograms of the green energy development focus on green transport,[36] energy-efficient lighting upgrade, supporting the production of decentralized renewable and alternative energy, agricultural energy,[37] waste industry,[38] and green sample projects.[39] In order to reach these goals, NSZP suggests more tools which are mainly connected to the creation of a more efficient and rational support and tender system, simplification of official authorization processes and capacity building.[40]

2. NSZP identifies low energy-efficiency as one of the main obstacles to leave economic depression behind. Half of the flats in Hungary are non-conform to modern insulation and heating requirements. In the case of public buildings, this rate is even worse.

[34] Communication from the Commission to the Council and the European Parliament, 848, 10. 1. 2007.

[35] *Új Széchenyi Terv* [New Széchenyi Plan], 2011, Budapest, 107-109. Available at: http://www.mnvzrt.hu/data/cms576186/Uj_Szechenyi_ Terv .pdf [cit. 2014-01-22].

[36] The aim of this subprogram is the modernization of public transport not only through the production of alternative fuels but through the improvement of infrastructure and production of alternatively powered vehicles, as well.

[37] The energetic or miscellaneous utilization of renewable commodity and by-products originating from agriculture.

[38] The energetic or miscellaneous utilization of agricultural and communal waste.

[39] Introduction of know-how's and good practices, supporting the complex projects of Hungarian innovative technologies.

[40] *Uj Széchenyi Terv* [New Széchenyi Plan], 114-115.

Energy-import dependency in Hungary is very high, which makes a more urgent matter to reduce unreasonable energy-waste. 40% of the overall consumed energy is used in buildings, from which two-third goes for heating and cooling. CO_2 emission in the buildings is much higher than in the industry, transport or agriculture. Building energy is one of the main priorities in the EU, as well. Saved energy, what is called "Negajoule" by the European Commission, is the biggest energy resource nowadays. NSZP takes into account that building energy-efficiency issues mainly affect the poor and underprivileged groups of society, which circumstance integrates energy-efficiency programs into the targets of economic development and social policies.[41]

The tools of the improvement of energy-efficiency are the same as in the previous section: in the first place, it is emphasized that sufficient tender-management, capacity and administration are crucial. This includes an applicant-friendly attitude (easy and logical processes, less rigorous methods) and wide tender portfolios which suit different needs. The predictability is, or should be an important factor in the world of tenders. Applicants should know the date of publication of tenders, the application deadlines (which are often too short) and the announcement of results in advance.[42] In numbers, the desired objective by the year of 2020 is at least 60% energy saving of investments in average, and 25 kWh/m^2/year energy consumption in new built buildings. NSZP takes the adequacy of Directive 2010/31/EU of the European Parliament and the Council (19th May 2010) on the energy performance of buildings into account, which requires measures from member states to reach minimum energy performance in most buildings. Article 9 obliges members to ensure that by December 2020, all new buildings shall be nearly zero-energy buildings and after 31st December 2018, new buildings

[41] Ibid. 131-134.
[42] Ibid. 134-145.

occupied and owned by public authorities shall be nearly zero-energy buildings.[43]

3. The third priority focuses on education and employment. The green-employment subprogram aims at generating 150-200 thousand new sustainable jobs in the green-economy and launching green public work programs for the less qualified workforce. These tasks can be carried out with different supporting measures which enhance green investments, especially in the field energy-efficiency.[44]

The green-education subprogram aims at creating quality-oriented education of industrial, agricultural and energetic experts in the scope of green technologies. This requires short term (1 year) programs, mid-term (1-3 years) skilled workmen, MSc programs and long-term (3-5 years) BSc and PhD programs.[45]

The third subprogram is the green view-form subprogram which only consists of a few soft-measures to increase the green-consciousness of people with PR and advertisement tools.[46]

4. The above-mentioned fields are based on high-quality knowledge, therefore, green R&D&I is a crucial base to build up other green programs. The rate of innovation in the proportion of GDP is lower than the European average. By 2020, Hungary should reach the 2% R&D&I rate of GDP, which is 20% in the field of green innovation. NSZP gives a list about support-worthy energetic innovations. These are connected to the defined priorities in energy and energy-efficiency programs, so the core issue is to change exhaustible natural resources to renewable resources like biomass, water, wind, solar and geothermic energy, and to reduce the environmental loads with CO_2 emission reducing technologies or

[43] In the use of the Directive nearly-zero energy buildings mean the calculated or measured amount of energy needed to meet the energy demand associated with a typical use of buildings which includes, inter alia, energy used for heating, cooling, ventilation, hot water and lighting.
[44] *Új Széchenyi Terv* [New Széchenyi Plan], 141-145.
[45] Ibid. 146.
[46] Ibid. 147-149.

invent new – environmentally less harmful – technologies in water management and public transportation.[47]

2.4. National Environmental Technology Innovation Strategy 2011-2020

On 6th September 2011, the Government adopted Decision No. 1307/2011 on National Environmental Technology Innovation Strategy (NETIS) for the period of 2011-2020. NETIS – as the previous strategies – also recognizes the need for change because of the multiple global crises related to food, fuel, freshwater and finance. The basic idea of NETIS is the strong connection between innovation and green growth. As it says, "innovation has an important role in generating employment, enhancing productivity growth through knowledge creation and diffusion in the post-crisis context".

NETIS is supposed to be the crucial framework to achieve the goals of the EU 2020 Strategy, especially, the Innovation Union initiative. The adoption of the strategy aims at shifting towards green economy through environmental technological innovation. In the scope of NETIS, those environmental technologies mean solutions which are associated with lower environmental loads, rather than traditional existing processes. These include technologies and processes which care with pollution, less polluting and less resources-demanding products and services, and methods and structural innovations which make resource-utilization more efficient.[48]

NETIS focuses on three main issues around product technologies, process technologies, process technologies and know how procedures and organizational and managerial procedures. The strategy is a mix of different policies, shown by the following table:

[47] Ibid. 151-154.

[48] *Nemzeti Környezettechnológiai Innovációs Stratégia*, [National Environmental Technology Innovation Strategy], 2011, Ministry of Rural Development, Budapest, 4.

Vision and Objectives	Policy tools – measures
• **Foster environmental industry, technology,** • **Increase share of environmental related innovations, competitiveness,** • **Paradigm shift: from end-of-pipe approach to prevention,** • **Increase effectiveness,** • **Decrease primary material use,** • **Increase reuse/recycling, improve resource-efficient services**	**Greening governance** - increase internal government cooperation including authorities and local governments, **Legal tools**: Innovation friendly legal system (e.g. simplification of administrative procedures, pressure to comply with legal requirements, extension of producers' liability) **Economic instruments**: 1. Green tax system; 2. Green public procurement; 3. Supporting environmentally friendly subsidies (removing environmental harmful ones). **Social tools**: raising awareness, improving green education, management and consultancy

1. table[49]

NETIS takes the three pillar system of sustainable development into account and recognizes that complex issues demand complex answers which involve the harmonization of many different policies like social, economical and legal policies.

NETIS has nine improvement directions with detailed targets which are more or less overlapped with the previously introduced strategies.

[49] Source: ILLÉS, ZOLTÁN (ed.): *National Environmental Technology Innovation Strategy*, 2012, Ministry of Rural Development, Budapest, 8. Available at: http://kornyezettechnologia.kormany.hu/download/b/4f/50000/NETIS_English.pdf [cit. 2014-01-26].

Intervention fields	Targets	Development areas
Horizontal type technological innovations	Sustainable resource management, resource efficiency, decrease of environmental loads.	Nanotechnology, biotechnology, use of photonics, bio-based products, advanced materials.
Air	Decrease air pollution made by transportation and households.	Improving public transport vehicles and traffic control, upgrading heating and energy efficiency.
Waste	Recycling, decreasing the organic content of waste, reducing waste production, less hazardous waste, selective collection of waste.	Low-waste technologies, separately collected waste processing, usage of waste as secondary raw materials.
Water	Decreasing specific water use in industry and agriculture, waste water recycling, ensuring high quality drinking water supply.	Water-efficient key technologies, water-saving agricultural technologies, iron and manganese removal technologies for drinking water.
Noise and vibration	Decreasing noise pollution in settlements, vibration protection.	Noise barriers, noise and vibration reducing traffic developments, sound insulation in buildings.
Construction industry	Eco-friendly construction, sustainable resource-management, energy-efficient buildings.	Building materials from renewable sources, usage of secondary raw materials and renewable energy sources, thermal insulation.
Renewable Energy	Efficient use of different renewable energy resources.	Heat pump energy use, waste heat capturing, heat energy recovering system, geothermal energy use, solar energy in households, biomass, small wind turbines, efficient energy storage, photovoltaic technologies.

Remediation	Remediation of polluted compartments (soil, water) and monitoring, giving priority to the green remediation.	Bioremediation, innovative technologies, in-situ processes.
Agriculture and soil protection	Decreasing environmental pressure, soil protection, more efficient water use, decreasing the use of pesticides, reducing soil pollution and waste production.	Eco-friendly technologies, organic farming technologies, efficient use of nutrients, irrigation and water recycling technologies, biological agents with integrated pest management, waste energy recovery, usage of geothermal energy.

2. table[50]

2.5. National Rural Strategy 2012-2020, and the Darányi Ignác Plan

On 21st March 2012, the Government adopted the National Rural Strategy (shortly NRS) and its implementation plan, the Darányi Ignác[51] Plan (Government Decision Nr. 1074/2012 (III. 28.). These action plans hold a lot of different subsystems with different aims and tools together in order to help the elevation of the Hungarian agriculture. The situation of agriculture and rural development is a very complex issue which requires societal, demographical, educational, geographical, economical and of course, technological interventions, as well. The overall objective of NRS is to increase the population carrying capacity and population holding capacity. The overall objective consists of three horizontal aspects: sustainability, territorial and societal cohesion, and city-country connection. These

[50] Source: ILLÉS: *op. cit.* 10-14.

[51] The name of the plan refers to Ignác Darányi (1849-1927), a Hungarian lawyer, agrarian, minister. He was member in the Hungarian Scientific Academy. In his political career Darányi worked always for the boosterism of the Hungarian agriculture.

involve more strategic aims like the preservation of natural values and resources (this one serves the sustainability aspect), multicolor and vivid agricultural production, food security and food safety (these two serve the territorial and societal cohesion), growing employment in the rural sector and enhancing the quality of rural lifestyle (these serve the city-country connection). NRS divides the abovementioned strategic aims to seven strategic fields. Two of them are worth to emphasizing: the protection and sustainable use of natural values and resources, and the improvement of the quality of rural environment. These connect to sustainability through the first strategic aim. On the lowest level, NRS consists of 42 national strategic programs and 8 regional development programs to achieve these comprehensive goals. Some of them refer to green economy and green technology, what is worth a short view within the scope of this paper.

NRS takes the foreseeable three pillar model of the Common Agricultural Policy (CAP) into account. The second pillar is the sustainable use of natural resources which suggests that innovation should serve "green growth", namely to reduce environmental loads and adapt to the consequences of climate change.[52] The first program which serves greening is the Soil-protection and Natural Resource Management Program. This requires new technologies which are able to prevent or reduce the effects of soil-degradation factors, ensure fertility of the soil with natural resources, increase reservoir capacity of the soil and reduce unnecessary waste of natural resources.[53]

[52] At the end of 2013, CAP 2014-2020 was adopted which is "greener" than the previous ones and aims at a more sustainable EU agriculture. See: Overview of CAP Reform 2014-2020, in *Agricultural Policy Perspectives Brief,* No. 5. (2013), published by the European Commission. *See* http://ec.europa.eu/agriculture/policy-perspectives/policy-briefs/05_en.pdf, [cit. 2014-01-27].

[53] *Nemzeti Vidékstratégia* [National Rural Strategy], 2012, Ministry of Rural Development, Budapest, 65.

The Protection and Restoration of Natural Resources, Territories and Ecosystem Services Program focuses on the maintenance of biodiversity.[54] It is crucial to continue and improve the existing plant-variety and animal species preservation programs and the fight against invading species.[55]

The Water Resource and Water Quality Protection Program aims at preserving the quantity and quality of one of our most important renewable but vulnerable natural resources: water. It demands advanced technologies which can reduce the waste of water. It is also important to reduce nitrate load originating from agriculture, which requires individual Nitrate Action Plan. Hungary is rich in thermal water; therefore, we have to take care of it with water-saving and energy-efficient methods of exploitation.[56]

Within the frame of Drinking Water Quality Improvement Program, it is an objective to reduce arsenic, boron, nitrite, fluoride, ammonium, iron, and manganese concentration. Besides, upgrading drinking water network is also necessary to prevent secondary water quality degradation.[57]

The Waste Water Program innervates used water sparing, the utilization of grey water[58] and the use of water-free technologies.[59]

The Air Quality Protection and Noise Reduction Program aims at spreading energy-efficient eco-friendly transport methods and infrastructure, both in private and public transportation. It is also necessary to use greener heating systems and cleaner heating fuels which are also energy-efficient. It is desired to significantly reduce

[54] The Earth Summit in 1992 shows the strong connection of biodiversity and sustainable development.
[55] *Nemzeti Vidékstratégia* [National Rural Strategy], 66-67.
[56] Ibid. 68.
[57] Ibid. 69-70.
[58] Used water is created by hand washing or vegetable washing. It is not infectious like waste water, therefore, it is suitable for washing, watering the garden or flushing the toilet.
[59] *Nemzeti Vidékstratégia* [National Rural Strategy], 70.

air-pollution, noise and stink loads of agricultural fields, especially in animal farms.[60]

Finally, a few words about Waste Management Program. Like the previous strategies, this one also urges the increasing amount of recycling and the settling of modern waste management facilities. Biomass which cannot be used as a by-product any more could be used in biogas or/and composting establishment to reutilize it.[61]

2.6. Jedlik Plan, National Strategy for the Protection of Intellectual Property

On 23rd September 2013, the Government adopted the Jedlik[62] Plan with Decision Nr. 1666/2013., which is the first comprehensive governmental strategy focusing on intellectual property. It defines mid-term objectives for the years of 2013-2016. The Jedlik Plan prescribes more than one hundred measures along the forty action directions. The Jedlik Plan has four pillars: industrial property law, copyright law, the use of IP in the service of national sectoral policies and institutional issues.

The Jedlik Plan has more horizontal connection points with other sectoral policies. For example, the New Széchenyi Plan identifies knowledge as an outbreak point of the Hungarian economy. Amongst the sources of economic growth, one of the most important ones is innovation, which can give a huge competitive advantage in the current financial-economic depression.

The abovementioned strategies foster green innovation in the field of agriculture and also regarding the protection of the environment. They operate with more efficient tenders and tax regulations to enhance the volume of innovations. However, nowadays, the costs of innovations are huge and these tools are not

[60] Ibid. 71.
[61] Ibid. 72.
[62] The name of the plan refers to Ányos Jedlik (1800-1895), Hungarian scientist, inventor, Benedictine. He researched mainly the electricity, many of his inventions connect to electric power. Jedlik invented the soda water machine as well.

sufficient to pay off the costs. The best tool for investors what can promise extra profit with the biggest chance is intellectual property law. The different types of protection provide exclusive rights to the rightholder, which can make innovations profitable in long term, as well.

The third pillar – the use of IP in the service of national sectoral policies – introduces the connection of green economy and industrial property under chapter 4.3.2. It lays down the basic concept that amongst global crises (climate change, increasing energy hungry, unpredictable change of energy price) sustainable (energy-efficient) development can only be maintained through the protection of natural resources, the preservation of biodiversity and the full exploitation of renewable resources. Such an economy is necessarily a green economy.[63]

Relevant fields of green economy from the aspect of industrial property are the followings:

1. alternative energy sources;
2. innovations in the field of environment protection industry;
3. environmental innovations in agriculture;
4. innovation connecting to waste management.

This list matches the focus points of the previously introduced strategies, which makes an inseparable bond between the different action plans. The Jedlik Plan emphasizes two types of protection which serve these innovations the best: patents that protect the innovation itself, and trademarks which help visualizing these innovations on the market. Utility models could also be useful tools; however, the number of granted utility models worldwide and domestically is significantly less than the number of granted patents, it is not a widespread form of protection, except in China. This could be the reason why it is not mentioned within this part.

[63] *Jedlik Terv, Nemzeti Stratégia a Szellemi Tulajdon Védelmére*, *2013-2016* [Jedlik Plan, The National Strategy for the Protection of Intellectual Property], 187-188. Available at: http://www.sztnh.gov.hu/jedlik-terv/Jedlik-terv.pdf [cit. 2014-01-28].

The Jedlik Plan investigates domestic patent applications of green innovations between 2007 and 2012, which fits to the scope of this paper. In this period, the number of patent applications grew from 74 to 122. Significant growth was experienced in the field of wind energy, building insulation, recycling and agriculture. However, in these five years there were not any green patent applications connecting to vehicles or incineration, and bio-fuels were also underrepresented fields, however, these were important strategic points in all strategies. Unfortunately, the number of trademark applications in the 40. class of the Nice Agreement classification which refers to green energy, was continuously decreased.[64]

Regarding new technologies, the timeframe between invention and the entry to market is quite important. The midsection is represented with the time of patent application process which varies case by case but in average it lasts 2,5 years, which is pretty good in international comparison. Many intellectual property authorities have special processes for the examination of green-patents, which can shorten the length of application process even with a year.[65]

The volume of licensing and the effectiveness of right enforcement would also be an important indicator regarding the current situation of green technologies; however, Hungarian Intellectual Property Office (HIPO) does not have sufficient data to analyze these. It is not mandatory to apply patent and trademark licenses to the registry; therefore, HIPO cannot have full and authentic information. They have no data about right enforcement either because there was not any special investigation in the green economy sector.

An important connection point between HIPO and the New Széchenyi Plan is that a positive examination result about the novelty and inventive step published by HIPO during the patent application process means an advantage in tenders of the New Széchenyi Plan.[66]

[64] Ibid. 189-190.
[65] Ibid. 192.
[66] Ibid. 191.

3. CONCLUSIONS

In the last years more national strategies were accepted which in some ways are connected to sustainable development and foster the use of more and more green technology to make the whole economy greener. These serve to protect the environment, which is one of the core dimensions of sustainable development. On the one hand, in the background of these strategies we find obligations from international law, and on the other hand, there are direct national obligations originating from the Fundamental Law, as described above.

The most suitable branch of law which can provide an effective intervention tool for the state is administrative law. Private law cannot really differentiate between green technologies or other technologies; it protects all intellectual creations the same way and provides the same rights to exploit these rights. However, administrative law gives a more direct state-control mechanism. As it has previously been written, the main equipment of encouraging innovation to move towards greening is the proper regulation of taxation and tendering operations. The socialist planned economy has a bad taste in the mouth, and after the change of political regime in the 1990s, it was not a popular idea to centrally plan the flow of the economy but after the EU accession this kind of economy control got a new impetus. Now, the state does not intervene directly but through tax and tender regulations it can indirectly affect the economy to reach the desired economic ways. The methods in a capitalist free economy are different than in the past regimes but the state-will for a central planning is the same.

Strategies were accepted quite frequently, year by year and there is a big overlap amongst them from the scope of fostering green economy. This raises the question whether previous strategies were really efficient or not. Or, for what else do we need newer ones? Are these plans able to determine the ways of economy? The number of patent applications is a good indicator of measuring the volume of high-profile green innovations. As the Jedlik Plan shows, in a few sectors of green innovation (like wind energy, energy storing, heat

insulation, waste management) considerable improvement can be observed. However, some industries like biomass or geothermic energy, vehicles or CO_2 emission reduction are almost unchanged. Despite of these numbers, in Hungary, geothermic and biomass energy production have, or should have the biggest role. The total amount of biomass is 350-360 million ton, of which only 10% is used for energetic goals. However, this low rate of utilization gives the 92% of our renewable energy production.[67] The question is why we cannot acknowledge the results of innovation in such an important energy industry field or in other lagging industries. One reason could be the extremely costly and time-consuming researches which cannot reach patentable status in a few years. In this case, frequent surveys can check the progress and it will be clear whether only time is necessary or something else is needed to make successful initiatives. A negative fact is that public-financed research centers (typically universities) have an extremely low intellectual property protection activity, which hampers economic exploitation of potential innovations. The Jedlik Plan identifies other unfavorable factors like the generally low intensity of R&D&I activity, the lack of sufficient capital of small and medium sized enterprises, the absence of result obligations for patenting in calling for tenders and the lack of presence of using intellectual property valuation methods.[68]

On 28th March 2013, the Parliament adopted Decision Nr. 18/2013. on National Sustainable Development Framework Strategy for the period of 2012-2024. The strategy is different than the previous one. NSDS was more pragmatic; it defined core priorities and fields that need to be improved. This new strategy has a more

[67] CSÁK, CSILLA – JAKAB, NÓRA: Magyar Nemzeti Jelentés a mezőgazdaságról és a fenntartható fejlődés követelményéről [Hungarian National Report on the Agriculture and the Requirement of Sustainable Development], in *Agrár- és Környezetjog*, No. 12. (2012) 67-68.
[68] *Jedlik Terv* [Jedlik Plan], 190.

theoretical approach about sustainable development,[69] and rather gives a report about the current situation and takes care of institutional relations. The separate analysis of this strategy was unnecessary because it did not define any detailed directions above the natural commitment next to green economy and preservation of resources, rather just defined declarations and referred to the core points of the New Széchenyi Plan Green Economy Development Program. However, the report about the current situation does not prove any progress in greening. After 7 years from the adoption of NSDS, this new strategy diagnoses the overuse of natural resources, their quantity is lowering and their quality is demoting. Many problems afflict the environment which makes lifestyle worse and the environment poorer. Biological diversity is reducing, the resistance of ecological systems is irreversibly damaged and the ecosystem is exhausted.[70] The solution is to foster green innovation in order to create greener technologies to spare the environment and reduce its exploitation to take time for regeneration. However, the solution was the same years ago as well but as the current report shows, result did not appear and the processes did not turn or slow down. This makes the efficiency of the different strategies questionable. Partial successes were recorded; however, the global picture remained unchanged. It can occur that it is just the question of time but perhaps more radical tools will be needed to reach

[69] The biggest change is the different thinking about sustainable development. The strategy gives an additional pillar to the classical three-pillar system. Next to the environment, economy and society, the fourth core factor is the human in itself. An adequate number of healthy people with useful knowledge is the most important resource of the nation, therefore, we cannot allow to drop behind the poorest people and lose their abilities. In my opinion, humans and societal dimensions cannot be separated so strict because the community of humans gives the society; they are in a part-whole relationship. *See* further in *Nemzeti Fenntartható Fejlődés Keretstratégia 2012-2024* [National Sustainable Development Framework Strategy 2012-2024], published in Parliament Decision Nr. 18/2013 (III. 28.).

[70] Ibid. Annex 1. row E3.

sustainability. The best mark of recognition of bad tendencies is the pessimistic title of the Parliament decision which adopted the Framework Strategy: *The national concept of transition towards sustainability*. Longer transitional period means more distant sustainability. We can just hope that Hungary will not give up its sustainability goals and it will not be stuck in the transition for decades.

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László KNAPP

Diverging Approaches of the Hungarian Constitutional Court Concerning the Position of EU Law in the Domestic Legal Order[1]

1. INTRODUCTION

Like in other countries of Central and Eastern Europe, after the political change in the late 1980s, a Constitutional Court has been established in Hungary, as well [Act XXXII of 1989 entitled the Hungarian Constitutional Court with competences similar to the *Bundesverfassungsgericht* (German Federal Constitutional Court)].[2] In the course of the 1990s, after Hungary submitted its application for EU membership, it had to face cases, which concerned the

[1] This paper has been firstly published as second part of the following study: HORVÁTHY, BALÁZS – KNAPP, LÁSZLÓ: The Relationship between the Hungarian and the EU Legal Orders, in SMUK, PÉTER (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Complex, Budapest, 51-68.

[2] It's worth to quote *Zdeněk Kühn*'s description on the situation in the post-communist countries after the collapse of the previous political system: "At most, national constitutional courts, viewing themselves primarily as guardians of national constitutions and following the lead of the German archetype, might pursue their national judicial politics, show themselves as the ultimate guardians of national sovereignty and delineate the limits of the ECJ's competence in the way the German Federal Constitutional Court did in its Solange II and Maastricht decisions." KÜHN, ZDENĚK: The Application of European Law in the Member States: Several (Early) Predictions, in *German Law Journal*, Vol. 6. No. 03. (2005) 572.

harmonization of the Hungarian legal order with the European law, as a precondition for the accession of the country.

The relation between the national and the EU law has been subject to the Hungarian Constitutional Court's decision after the accession of Hungary on 1 May 2004. The judgments dealt with particular problems in the relation of the two legal orders. In line with these, this study is intended to draw, if not a complex approach, but the main elements of the Court's practice.

2. EUROPEAN LAW AND THE CONSTITUTIONAL COURT PRIOR TO HUNGARY'S ACCESSION

Long before Hungary's EU accession the Hungarian Constitutional Court formulated an early approach concerning the relationship between the EU law and the law of the Member States. Decision 4/1997 of the Constitutional Court (hereinafter: CC) dealt with the constitutionality of *ex post facto* review of national laws promulgating international treaties. According to the opinion of the Court, although if "there is no specific regulation concerning this – due to the universality of constitutional review – constitutional courts examine the constitutionality of them in exactly the same way as in the case of domestic review."[3]

The Constitutional Court reflected the current developments in Europe, regarding the relation between international law and domestic legal systems and the role of the law of the "European integration." At this point, the Court laid down no clear difference between international and European/Community law. Instead of doing so, it emphasized the latter's role of making a change from the often dualist approach in the European states to a monist-adoption concept.

It is noteworthy to quote the full reasoning of the Court concerning the position of EU law in the Members States' legal order

[3] Point II. 7.

and the competences of the constitutional courts connecting to that.[4] It generally emphasized, that "even those members of the EU which still follow the transformation system (e.g. Germany, one of the founding members, Italy, and the Scandinavian countries, which subsequently joined to the European Union) apply the law of the European Union directly, without transformation, and they ensure *priority* (sic!)[5] over national law with the exception of the Constitution.[6] As a result of this, the constitutional courts exercise their competence regarding constitutional examination concerning international treaties (international law) and the decisions of international organizations – due to the adoption system – automatically becoming the part of the domestic law."

After that, like in many other cases, the Court referred to the practice of the German Federal Constitutional Court, making no difference between the *ex post facto* review of EU related and non-EU related international treaties of the Karlsruhe Court. It concluded its examination with the following: "from these decisions, the following position becomes clear: the German Federal Constitutional Court, besides its "naturally" exercising constitutional power concerning ex post facto review – especially with regards to the European Union treaties – must not give up any part of its task to protect the Constitution; this function extends to every way of exercising sovereignty under the *Grundgesetz* (Basic Law [for the Federal Republic of Germany]). On this basis, the Constitutional Court – besides examining the law promulgating a treaty – retains the submission to the EU law under constant control." The aforementioned unclear statement gave reason for the jurisprudence to suppose a possible future approach to EU law. The mere fact that it has not clearly acknowledged the EU legal order, as an

[4] *See* BLUTMAN, LÁSZLÓ – CHRONOWSKI, NÓRA: Hungarian Constitutional Court: Keeping Aloof from European Union Law, in *Vienna Online Journal of Constitutional Law*. Vol. 5. No. 3. (2011) 331–332.

[5] Emphasis added – L. K.

[6] Act XX of 1949 The Constitution of the Republic of Hungary (*not in force*).

autonomous one, separate from international law, made it presumable that the Court will follow a hard-line defending position if favour of the national constitution, similarly to the German Federal Constitutional Court.[7]

Regarding the Hungarian Constitutional Court's attitude towards EU law, Decision 30/1998 CC is of dual nature. On the one hand, it is provided with a more detailed clarification concerning the relationship between the EU and the Member State's law; on the other hand, Hungarian legal order is appeared in a rather self-standing manner.

According to Hungary's Europe Agreement[8] – and the Government Decree promulgating the decision of the Association Council on several executive norms of the Europe Agreement[9] – the Hungarian Competition Authority had to follow, in competition matters falling within the scope of the Europe Agreement, not only

[7] *Ernő Várnay* summarizes in his paper the prevailing opinion in the jurisprudence of that time. VÁRNAY, ERNŐ: Alkotmánybíróság és az Európai Unió joga [Constitutional Court and the Law of the European Union], in *Jogtudományi Közlöny*, Vol. 62. No. 10. (2007) 431. According to *Mihály Ficsor*, although the Constitutional Court seems to recognize the *sui generis* character of EU law, it might not make a difference between this and the international law. FICSOR, MIHÁLY: Megjegyzések az európai közösségi jog és a nemzeti alkotmány viszonyáról II. [Remarks on the Relationship Between European Community Law and the National Constitution II.], in *Magyar Jog*, Vol. 44. No. 9. (1997) 528. In *Janos Volkai*'s opinion it is presumable that the Court will follow the German Federal Constitutional Court, causing conflict between Community law and Hungarian law after the accession. VOLKAI, JANOS: The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions, in *The Jean Monnet Working Papers*, No 8. (1999) Available at: http://centers.law.nyu.edu/jean monnet/archive/papers/99/990801.html [cit. 2014-03-10].

[8] Act I of 1994 on the promulgation of the Europe Agreement signed in Brussels on 16 December 1991 establishing an association between the Republic of Hungary and the European Communities and their Member States (*not in force*).

[9] Government Decree 230/1996 (*not in force*).

the criteria inherent the EU law and practice of the EU competition authorities existing at the time of signing the Agreement, but also the adopted norms and the legal practice of the mentioned authorities established thereafter.

Unlike Decision 4/1997 CC, Decision 30/1998 CC contains a more precise description of the doctrines of EU law. Concerning the subject matter of the case, the principle of direct application has been emphasized, differentiating Union law from international law. While international treaties become part of national law through, for example, confirmation and promulgation or confirmation and incorporation, such a transformation is not necessary in the case of Union law.

Although the Court recognized the approximation of Hungary's present and future legislation to Community law, as it has explicitly been undertaken by the country under Article 67 of the Europe Agreement, it referred to the fact that Hungary is not a member of the EU yet, and considering this, the "Community's internal law" is still *foreign law* in respect of the application of it.

The main point in the Constitutional Court's reasoning in this case was that before the country's accession, the principle of direct application does not govern position in the Hungarian legal system, and the Europe Agreement can be regarded as a treaty under international law. According to Art. 2 para. (1) of the Constitution, "the Republic of Hungary is an independent democratic state governed by the rule of law", and as such, its authorities cannot be bound – without violating its sovereignty – by norms and practice of another public order, namely the European Union.

Concerning the EU accession procedure of the country, the same point gained greater importance stipulating that "the Parliament may not amend the Constitution in a disguised manner by adopting or promulgating an international treaty." This argumentation has led to the amendment of the Constitution with the Europe Clause,[10] the

[10] Art. 2/A. (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extant

authorizing provision for the EU accession.[11] For the sake of an incontestable political legitimacy, a binding referendum has been held one year before Hungary's accession.

3. European Law and Hungarian Law in the Practice of the Hungarian Constitutional Court after the Accession

The first case the Constitutional Court had to deal with was on the implementation of transitional provisions in order to avoid the misuse of the EU agricultural export refund measures. Regulations 1972/2003/EC[12] and 60/2004/EC[13] intended to prevent the accumulation of surplus stocks of certain agricultural products reflecting the price differences between the old and new Member States and countries outside the EU.

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necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in paragraph (1) shall be subject to a two-thirds majority vote of the Parliament.

[11] *See* BLUTMAN – CHRONOWSKI: *op. cit.* 332.; HORVÁTHY, BALÁZS: Az uniós és a magyar jogrendszer metszéspontjairól [On the Points of Intersection of Union and Hungarian Law], in SZIGETI, PÉTER (ed.): *Leviatán. Tomus V*. 2007, Universitas-Győr, Győr, 27.

[12] Commission Regulation (EC) No 1972/2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L 293 (11 November 2003).

[13] Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L 9 (15 January 2004).

To fulfil the requirements laid down by the aforementioned Regulations, the Hungarian Parliament adopted the act "on measures related to the accumulation of commercial surplus stocks of agricultural product" (hereinafter Surplus Act). The Surplus Act introduced tax provisions for operators involved in speculation trade movements stockpiling certain agricultural products.

In its Decision 17/2004 CC, the Constitutional Court based its jurisdiction on the examination of the Hungarian law implementing the EU Regulations, without prejudice to the latter's content. On the one hand, the Court dealt with pure Hungarian legal issues, since it declared unconstitutional the definition of possible taxpayers, and the method that the determination of tax provisions has been delegated to executive decrees.

On the other hand, it also examined measures of double nature. The two Regulations have been published in the Official Journal in November 2003 and January 2004 (and modified in February and April 2004). In line with these, the Surplus Act contained provisions, which concerned the procedure of the tax payment, e.g. that its basis is the inventory of 1 May, the daily average of the stocked products in the previous years had to be taken into consideration or Section 5 prescribing that transactions, which occurred after 1 January 2004 are not to be considered for the reduction of stock. Due to their retrospective character, those provisions have been declared unconstitutional, which practically repeated the measures of the two Regulations.

Quoting Decision 30/1998 CC, it stated that before Hungary's accession, without implementing EU law, there is no obligation for the direct application of EU legal measures. But the question arose, how Hungarian legislators could have passed a non-retroactive implementing act in cases of Regulations dating from the end of 2003 and the beginning of 2004? Furthermore, according to the petition, the principle of legal certainty has also been violated with the presumption that traders would make use of the EU refund measures *maliciously*, although stocking had not been forbidden by the Hungarian law before the Regulations have been adopted and implemented into the domestic law.

In its reasoning, the Court emphasized several times, that the subject of its examination was the adopted Hungarian act, not the Regulations themselves. Finally, it declared the aforementioned provisions unconstitutional – judging the constitutionality of the EU Regulations in an indirect manner.[14]

In the next relevant decision, the Constitutional Court repeated its reasoning on the relationship between EU secondary legislation and Hungarian law.[15] Act XXIV of 2004 on Firearms and Ammunition has been adopted as an implementing measure of Directive 91/477/EEC on control of acquisition and possession of weapons.[16] The petitioner stated that the sellers' duty to keep the buyers' record for a certain period violates the right for data protection laid down in the Constitution.

The Court formulated, that concerning the directives and the secondary EU legislation in general, the obligation has arisen for the Member States that they have to implement them in line with their own legislation procedure. It quoted the key element from its reasoning in 17/2004 CC, that "the question about the provisions challenged in the petition concerns the constitutionality of the Hungarian legislation applied for the implementation of the EU regulations (here: directives) rather than the validity or the interpretation of these rules."

László Blutman and *Nóra Chronowski* pointed out that the requirement of adequate transposition could be derived from certain

[14] *Márton Varju* and *Flóra Fazekas* described the paradox situation with the following: "While the jurisdiction to examine the compatibility of EU measures with domestic constitutional principles was not taken up by HCC [Hungarian Constitutional Court], arguably by examining the constitutionality of the domestic act stemming directly from the Commission Regulations, in an indirect manner the HCC passed a judgment on the constitutionality of the Regulations." VARJU, MÁRTON – FAZEKAS, FLÓRA: The Reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary, in *Common Market Law Review*, Vol. 48. No. 6. (2011) 1956.

[15] Decision 744/B/2004 CC.

[16] OJ L 256 (13 September 1991).

sections of the Constitution.[17] With the establishment of the postulate of the "*harmony*[18] between Union law and domestic law follows from the Constitution itself or jointly form the Constitution and the Accession Treaty, then it would open up the possibility of treating the conflict between a transposing and implementing domestic norm and Community law as – at least – a formal violation of the Constitution."[19]

Reflecting the ratification procedure of the Constitutional Treaty, Decisions 58/2004 CC and 1/2006 CC dealt with a referendum initiative against the "Constitution for Europe". The argumentation of the petitioners was based on the status of the

[17] Art. 2/A, Art. 6 para. (4) and Art. 7 para. (1) of the former Constitution:
Art. 2/A: see above.; *Art. 6 (4)* The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security of the peoples of Europe.; *Art. 7(1)* The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.
Now Art. E and Q (3) of the Fundamental Law of Hungary (*adopted on 18 April 2011, entered into force on 1 January 2012*):
Art. E (1) In order to achieve the highest possible measure of freedom, well-being and security for the peoples of Europe Hungary shall contribute to the achievement of European unity. (2) In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union. (3) The law of the European Union may stipulate generally binding rules of conduct subject to the conditions set out in paragraph (2). (4) The authorisation for expressing consent to be bound by an international treaty referred to in paragraph (2) shall require the votes of two-thirds of all Members of Parliament.; *Art. Q (3)* Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law.
[18] Emphasis added - L. K.
[19] BLUTMAN – CHRONOWSKI: *op. cit.* 341.

document, namely it is not a simple modification of the earlier Founding treaties, but as a new international treaty, it will replace them.

The Court accepted that the Act of Accession declared only the *existing acquis* to be binding for the new Member States. Although the Treaty has been signed by the Hungarian Prime Minister; until it is not "*empowered*" by the Parliament, it is still possible to initiate a referendum on it, since it is a question within the competence of that legislative body – a prerequisite for initiating referenda in Hungary.

A petition was submitted again, but in line with the aforesaid reasoning. It was rejected again, since the Parliament has already ratified the Constitutional Treaty with Parliament Resolution 133/2004.

The conception of the Court concerning the EU Founding treaties has been clarified in Decision 1053/E/2005 CC. According to the petitioners Hungary failed to comply with the obligations resulting from the free movement of services of the EC Treaty, when it maintained the restrictive provisions of the Acts on Gambling Operations (Act XXXIV of 1991) and Business Advertising Activity (Act LVIII of 1997), concerning the purchase, organization and advertising activities connected to gambling coming from abroad.

As against the argumentation of the petitioners, the Court pointed out, that the Constitution's Europe Clause contains only the place of the Union law in the Hungarian legal order, and no concrete obligation to legislate is stemming from the mentioned provision. Therefore, there is no reason to determine unconstitutionality due to the legislator's omission in the given case, since a mere conflict between EU law and Hungarian law does not establish unconstitutionality.

On the other hand, concerning the position of EU law in the national legal order of Hungary an important statement has been stipulated: despite their international origin, the Constitutional Court does not intend to treat the Founding treaties as international treaties.[20]

[20] Point III. 2.

Until that point, the following scheme could have been drawn: those EU connected legal acts could be judged by the Court that fall within the competence of the Hungarian legislator, *i.e.* implementing measures and unratified treaties.[21] Regarding a substantive conflict between the two legal orders, the Court continuously refused to examine it.

This has been reaffirmed in Decision 61/B/2005 CC on data transferring issues concerning preliminary ruling procedures: "The jurisdiction of the Constitutional Court is laid down by Section 1 of the Act on the Constitutional Court. The cited provision contains no competence authorizing the Constitutional Court to examine collision with Community law. Pursuant to the rules of Community law, this question falls within the competence of the organs of the European Community, finally the European Court of Justice."[22] Additionally, the character of the Europe Clause has been examined. According to the Court, it determines the *position* of Union law in the Hungarian legal system, but it is based on a closed, introspective logical structure, without any reference to the features of EU law.[23]

As the previous decisions have shown, the Constitutional Court did not provide with a complex, well-built system concerning the relationship between Union law and Hungarian law, but the *sui generis* character of the former one could be concluded after the aforementioned decisions. But a new approach was drawn in Decision 72/2006 CC.

The subject matter of the case was the presumed unconstitutionality of several labour law provisions, especially measures of the Labour Code (Act XXII of 1992) and the Act on the

[21] VINCZE, ATTILA: Az Alkotmánybíróság esete az Unió által kötött nemzetközi szerződésekkel [The Constitutional Court's Case with the International Treaties Concluded by the Union], in *Európai Jog*, Vol. 8. No. 4. (2008) 27.

[22] Translation by BLUTMAN – CHRONOWSKI: *op. cit.* 337.

[23] Explaining this, Márton Varju and Flóra Fazekas emphasized that "the constitutional status of EU law in domestic law is approached solely on the basis of Section 2/A." VARJU – FAZEKAS: *op. cit.* 1949.

Status of Public Employees (Act XXXIII of 1992). The petition claimed that the current Hungarian regulation violates EU law, since the Parliament omitted to enact an implementing measure on Directive 2003/88/EC concerning certain aspects of the organization of working time.[24] The petitioner pointed out, that the Founding treaties of the European Communities, which are treaties under international law, are the legal basis of the Directive.

The Court replied it with the following argumentation:

"The Constitutional Court has established in Decision 1053/E/2005 CC that the Founding and Amending treaties of the European Communities are not considered treaties under international law in respect of establishing the competence of the Constitutional Court, and these treaties – being primary sources of law – and the Directives – being secondary sources of the law – are as Community law part of the *internal law* (sic!),[25] since Hungary has been a Member State of the European Union since 1 May 2004. With regard to the competence of the Constitutional Court, Community law is not considered international law as specified under Art. 7 para. 1 of the Constitution. In the petition aimed at the examination of collision with a treaty under international law, the petitioner has not referred to any treaty under international law other than the Directive."

Attila Vincze revealed that there is a discrepancy regarding the "*EU law as internal law*" concept. On the one hand, if it is internal law, there is no further obstacle to review its constitutionality in line with competence provisions of the Act on the Constitutional Court. On the other hand, it contravenes the sui generis character of EU law, which has been established in the previous decisions.[26]

Soon after its adoption, the Court had to narrow down this concept in Decision 32/2008 CC, making itself able to judge on the content of the arrest warrant agreement between the EU, Iceland and

[24] OJ L 299 (18 November 2003).
[25] Emphasis added - L. K.
[26] VINCZE: *op. cit.* 27-28.

Norway[27] (hereinafter EUIN Agreement). Although the EU Treaty provided the EU with express treaty-making competence in the field of police and judicial cooperation in criminal matters,[28] since it concerned such sensitive criminal law principles as *nullum crimen sine lege* or *ne bis in idem* with the possible consequence of affecting the application of national criminal rules, it has been concluded as a mixed agreement with the Member States as parties in it.

To establish its competence, the Constitutional Court had to modify the conception on EU Treaties laid down in its earlier decisions. According to them, Hungarian laws promulgating EU related international treaties fall within the competence of the Court, until the "empowerment" of the Parliament (58/2004 CC and 1/2006 CC), after it, it is considered not international but Union law (1053/E/2005 CC) – which became internal law (72/2006 CC), but outside the jurisdiction of the Court (61/B/2005CC).

Since the Hungarian Parliament has already adopted an act promulgating the EUIN Agreement, it should have been characterized as EU law. To solve this, the Court introduced a new differentiation among EU related treaties. On the one hand, it referred the opinion of the EU itself, according to which, this kind of treaties are "*international treaties* regulated by the rules of international law." Reflecting its own previous practice, on the other hand, it laid down, that "since it does not change any of the competences of the European Union or the European Communities regulated in the so-called Founding and Amending treaties, but it establishes obligations in the relation of the individual Member

[27] Council Decision 2006/697/EC of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. OJ L (31. October 2006).

[28] Art. 38. TEU – VINCZE: *op. cit.* 30. According to Art. 38. TEU, "Agreements referred to in Article 24 [under Title V: Provisions on a Common Foreign and Security Policy – L. K.] may cover matters falling under this title."

States and Iceland and Norway." And since it is not a Union legal norm, it falls outside the scope of Art. 2/A of the Constitution, therefore it is to be considered as an international treaty and because of this constitutional review by the Court is possible.

Similarly to the case of the Constitutional Treaty, the Court had to deal with petitions concerning the Treaty of Lisbon. Decision 61/2008 CC was about a referendum initiative intending to reject the "binding force" of the modifying treaty for Hungary. The Court has repeated its argumentation from Decisions 58/2004 CC and 1/2006 CC that a referendum is possible until the treaty is "empowered" by the Parliament. Like in 1/2006 CC, it rejected the petition referring to the fact that the Parliament has already promulgated the Treaty by Act CLXVII of 2007 (hereinafter Promulgating Act).

In Decision 143/2010 CC the Court had to deal with the very substance of the Treaty of Lisbon. According to the petitioner it jeopardizes the existence of the Republic of Hungary as an independent state governed by the rule of law. Before responding to the petition, the Court defined the status of the Lisbon Treaty, continuing to reshape the position of EU law in the Hungarian legal order started in Decision 32/2008 CC.

The question arose whether an *ex post facto* review of the Promulgating Act is possible or not. The Court established its competence to examine it due to the international law origin of that Treaty. This reasoning could be considered as a return to Decision 4/1997 CC, since it contains a rather dualist approach to EU law. It is considered to be more problematic that it contravenes the doctrine of EU law as *sui generis legal order* stipulated in the earlier judgments, and the logic of Decision 72/2006 CC, where it stated that EU law becomes part of the internal legal order.[29]

[29] *László Blutman* concluded that "the Treaty of Lisbon (and therefore the Founding treaties in general), according to this, prevail through the implementing act as international treaties in the domestic law [translated by L. K.]." BLUTMAN, LÁSZLÓ*:* Milyen mértékben nemzetközi jog az Európai Unió joga a magyar alkotmányos gyakorlatban? [To What Extent Can European Law Be Considered as International Law in the Hungarian

Although the Court has established a competence to review the content of the Promulgating Act, in line with 4/1997 CC, it also laid down that in case of unconstitutionality, it shall have no effect on the obligations assumed by the Republic of Hungary, and the legislature should find a proper solution to ensure the harmony between European Union and Hungarian law.

Partially giving up its – so far introspective – approach, the Court stated that albeit it has no competence for substantive interpretation of EU law, there is no obstacle to referring to and quoting the concrete norms of the Lisbon Treaty, as they are *facts*. Answering the petition, the Court laid down, that the Treaty does not establish a European 'superstate'. Although it has gained legal personality to become "stronger and more efficient", but the governments continue to conduct and control it. Besides its legal status, three constitutional novelties have been introduced,[30] namely a of wider control mechanism for the national parliaments, the citizens' initiative as a further step to secure the rule of law involving the European citizens and the Charter of Fundamental Rights as a "collection of legally binding guarantees" of the citizens' rights.

Another international treaty was subject to its most recent decision concerning the position of EU law in the Hungarian legal order,[31] namely the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter Fiscal Compact). The Government petitioned the Constitutional Court to interpret the new Europe Clause of the Fundamental Law to decide whether the Fiscal Compact is to be considered as an international treaty under Article E (2) where two-thirds majority voting is required in the Parliament for the ratification or, as for other international treaties, simple majority voting is sufficient.

Constitutional Practice?], in KOVÁCS, PÉTER (ed.): *International Law – A Quiet Strength, Le droit international, une force tranquille (Miscellanea in memoriam Géza Herczegh)*, 2011, Szent István Társulat – Pázmány University Press, Budapest, 296–297.

[30] Listed by VARJU – FAZEKAS: *op. cit.* 1954.

[31] Decision 22/2012 CC.

The aforementioned paragraph of the Fundamental Law authorizes Hungary to exercise competences jointly with other Member States or through the institutions of the European Union. According to its reasoning, the Court cannot decide on the nature of the given Treaty, but the legislative power exercising the state's sovereignty has to clarify the Fiscal Compact's character. Although being self-restrictive in this case, the Court drew attention to certain elements (the states will sign it as Member States of the EU, it will establish new competences for the Union institutions), which let the legislature assume the Court's opinion.

4. CONCLUSION

The practice of the Hungarian Constitutional Court is rather introspective concerning the relation between the two legal orders. As it has been examined, it set out different approaches regarding this issue, continuously refusing to provide with a complex, logically closed analysis on the relation between the Union and Hungarian law. The Court considers its competences as being restricted by two powers that it does not want to touch. On the one hand, it has not interpreted EU law, since it belongs to the competences of the European Court of Justice. Since this relation affects Hungary's sovereignty as an independent state, the Court left the decision on the competence transfer to the legislation, on the other hand. It should define how far the common and/or joint exercise of competences shall extend. This self-restraint in law and practice regarding EU related matters is not unique among the Member States and indeed, it fits well into the broad picture of constitutions of the Eastern European EU Members. In this regard, it is worth to quote *András Sajó*'s view, in which this tendency among the aforementioned countries including Hungary is explained by the strong pro-independence public sentiment and historical grounds, *i.e.* that these countries are newly recognized nation-states that have regained their

sovereignty in recent times after the fall of communism and the political transition.[32]

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[7] SAJÓ, ANDRÁS: The Impacts of EU Accession on Post-communist Constitutionalism, in *Acta Juridica Hungarica,* Vol. 45. No. 3–4. (2004).
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János KRIZSÁN

EU Training Mission in Mali – 2013

1. INTRODUCTION

In 2013, after the "Arab spring", disturbing news about armed conflict in Northern Africa reached the international community again. An ethnic (more like tribal) conflict, with a virtually powerless government and a violent *coup* evolved into civil war where the ever-present terrorist cells became suddenly active in the region and the conflict threatened with a humanitarian disaster – let alone the creation of a terrorist foothold in the neighbourhood of Europe.

This study gives a brief insight into the events of the Malian conflict, its causes and its evolution; describes the EU – and particularly the French – approach and in particular, it introduces the training mission, its goals, agenda, progress and results. Since the study focuses on the training mission and the strategy of the European Union regarding the conflict, it applies an approach from the angle of the Common Security and Defense Policy.

2. THE ROLE OF THE MISSION

The European Union Training Mission (EUTM) in Mali is a venture of a military training organised, financed and led by forces of member states of the European Union. Due to the recent events in Mali, this country in the Sahel region[1] has become a nest of high insecurity: Tuareg rebels, joined by Islamic terrorist groups have taken over the northern part of the country, with the aim of forming

[1] A large region south of the Sahara desert, stretching across Northern Africa.

an independent, Islamic country. It took several months and a foreign intervention to solve the crisis. The goal of the mission is to help rebuild the Malian armed forces, thus, contributing to the restoration of public order in the country and the region, eliminating the threat of terrorist presence and alleviating concerns for Europe in humanitarian issues.

The European Union's objective in Mali is to support Malian efforts in order to:

1. fully restore constitutional and democratic order through the implementation of road-map adopted on 29 January by the National Assembly;
2. help the Malian authorities to fully exercise their sovereignty over the whole of the country;
3. neutralise organised crime and terrorist threats.[2]

3. THE EVENTS

As a "spill-over effect" of the "Arab spring", in the so-called region of Azawad, in northern Mali, several Tuareg military groups claimed for greater independence from the Malian government via organising an insurgency in the region.

[2] EU Training Mission in Mali, Common Security and Defence Policy. Available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-mali/pdf/factsheet_eutm-mali_en.pdf [cit. 2013-11-06].

1. Figure Tuareg populated area

On 22 March 2012, several officers of the Malian army, declaring that the actual government was incapable of treating the Tuareg uprise in the north, managed to perform a *coup d'état* and took over control in Bamako.[3] They suspended the constitution but promised that after dealing with the rebels they would welcome a new, democratically elected government.

Despite the takeover, the situation escalated. Approximately two weeks later, on 6 April, the organization of revolters, the MNLA (*Mouvement National pour la Libération de l'Azawad*, Azawad National Liberation Movement), supported by a radical Islamic group, managed to occupy the northern region of Mali (see on the map);[4] after occupying three neighbouring towns and driving out the Malian army, they declared the independence of Azawad.[5] Neither the surrounding, nor the leading nations recognised the sovereignty

[3] Coup d'Etat au Mali : le couvre-feu est décrété, in *LaMonde*, available at: http://www.lemonde.fr/afrique/article/2012/03/22/les-mutins -maliens-disent-avoir-renverse-le-president-toure_1673677_3212.html [cit. 2013-11-06].
[4] Source: http://www.globalsecurity.org [cit. 2013-11-06].
[5] Mali Tuareg rebels declare independence in the north, in *BBC News*, available at: http://www.bbc.co.uk/news/world-africa-17635437 [cit. 2013-11-06].

of the newly born "state"; what is more, tensions rose promptly, concerning the security of the region and thus, that of Europe.

Consequently, the overall situation rapidly deteriorated; thousands of people fled their homes, seeking asylum in the neighbouring countries (e.g. Burkina Faso, Mauritania, Niger), further aggravating the food crisis in the Sahel region,[6] the West African regional body (called ECOWAS) imposed a full trading embargo on Mali and froze its funds in its central bank (member countries use a common currency).

The aforementioned radical Islamic group, *Ansar Dine* ("Defenders of Faith") imposed strict Sharia, Islamic common law in Azawad; what is more, during the following months, they successfully ousted Tuareg rebels who were forced to retreat from most of the region at the end of June.[7]

The government of Mali asked for military intervention in order to recapture the northern parts of the country. On 11 January 2013, François Hollande, President of France announced that they were going to aid the Malian armed forces to restore their authority over the occupied region.[8] By the beginning of February, the combined French, ECOWAS and Malian forces managed to drive the Islamists out of Azawad; on the other hand, Tuareg separatists continued to fight their former allies; although, they were reported to have performed attacks against the Malian army, as well.[9] On 18 June 2013, the Malian government and the Tuareg rebels signed a peace

[6] Mali's Conflict Refugees – Oxfam Briefing Paper, 1

[7] Trouble in Timbuktu as Islamists extend control, in *The Telegraph*, available at: ttp://www.telegraph.co.uk/news/worldnews/africaandindian ocean/ mali/9365390/Trouble-in-Timbuktu-as-Islamists-extend-control.html [cit. 2013-11-06].

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[9] Five Malians killed in ambush blamed on Tuareg army, in *Globalpost*, available at: http://www.globalpost.com/dispatch/news/afp/130322/five-malians-killed-ambush-blamed-tuareg-army [cit. 2013-11-06].

deal in Ouagadougou, concerning an immediate ceasefire and governmental return to the Tuareg-held city of Kidal.[10]

During autumn, a one-week tension threatened with the return of hostilities in the country; on 26 September, the MNLA cancelled their participation in the peace deal, complaining that the government had failed to keep their end of the agreement; after that the Malian authorities released 23 insurgents, on 5 October the separatists announced that they were willing to rejoin the peace process.[11]

On 11 August, presidential elections were held, with the victory of Ibrahim Boubacar Keïta.[12]

4. THE LAUNCH OF EUTM MALI

During the events elaborated above, Malian armed forces proved to be unable to handle the dangerous situation caused by the combined forces of the separatists and Islamic extremists. An effort was needed to modernise the Malian army; furthermore, this mission fits into the global approach of the European Union, outlined in the *Strategy for Security and Development in the Sahel*.[13]

After the official request from the Malian government, and in accordance with United Nation Security Council resolutions

[10] Mali and Tuareg rebels sign peace deal, in *BBC News*, available at http://www.bbc.co.uk/news/world-africa-22961519 [cit. 2013-11-06].

[11] Tuareg rebels rejoin peace process in northern Mali, in *Reuters*, available at: http://www.reuters.com/article/2013/10/06/us-mali-rebels-idUSBRE99500020131006 [cit. 2013-11-06].

[12] Présidentielle au Mali: Soumaïla Cissé reconnaît sa défaite et félicite Ibrahim Boubacar Keïta, in *Les Voix du Monde*, available at: http://www.rfi.fr/afrique/20130813-presidentielle-mali-soumaila-cisse-reconnait-defaite-felicite-ibrahim-boubacar-keit [cit. 2013-11-06].

[13] European Union External Action Service, Strategy for Security and Development in the Sahel. Available at: http://www.eeas.europa.eu/africa/docs/sahel_strategy_en.pdf [cit. 2013-11-06].

(S/RES/2071[14] and S/RES/2085[15]), the European Union decided to start a new military mission within the framework of Common Security and Defence Policy (CSDP).[1617]

The mission was launched on 17 February 2013, after a meeting in Brussels, where foreign ministers of the European Union and the Malian Foreign Office Minister, Hubert Coulibaly met each other and decided to immediately begin the training of the Malian army. The European Council appointed Brigadier General François Lecointre from France as the commander of the EU mission.[18] The Council set up the headquarters of the mission in the capital, Bamako.

Earlier, on 8 February, an advance team consisting of 70 members arrived in Bamako; with the Malian authorities whose task was to finalise the system for providing advice to the chain of command and prepare the setting-up of the headquarters and the arrival of the trainers for the mission in Bamako.[19]

[14] UN Security Council Resolution 2071 (2012). Available at: http://www .un.org/en/ga/search/view_doc.asp?symbol=S/ RES/2071 [cit. 2013-11-06].

[15] UN Security Council Resolution 2085 (2012). Available at: http://www .un.org/en/ga/search/view_doc.asp?symbo l=S/RES/2085(2012) [cit. 2013-11-06].

[16] BAREA, JUAN CARLOS CASTILLA: The Malian Armed Forces Reform and the Future of EUTM, in *Instituto Espanol de Estudius Estratégicos, Documento de Opinión*, 2013. Available at: http://www.ieee.es/ en/Galerias/fichero/docs_opinion/2013/DIEEEO93-2013_EUTM_Mali_ CastillaBarea_ENGLISH.pdf [cit. 2013-11-06].

[17] HAESEBROUCK, TIM: Katarina Engberg: The EU and Military Operations: A comparative analysis, in *Journal of Contemporary European Research*, Vol. 9. Issue 5. (2013) 770.

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[19] Advance party of EUTM Mali arrives in Bamako, A 72/13. Brussels, 8 February 2013. Available at: http://www.eutmmali.eu/wp-content/upl oads/2013/02/Advance-party-of-EUTM-Mali-arrives-in-Bamako-Press-re lase12.pdf [cit. 2013-11-06].

The official launch of the mission was announced on 20 February in Bamako with the participation of General Dembélé (*Chef d'État-Major Général des Armées*, CEMGA; Joint Chief of Staff), General Camara (Minister for Defense, Mali) and General Lecointre. General Lecointre and Dembélé signed a technical arrangement which set the responsibilities and obligations of the Malian and European forces.[20]

5. PARTICIPANTS OF THE MISSION AND THE ROLE OF FRANCE

In EUTM Mali, 23 European countries decided to take part and contribute to the adequate training of the Malian forces: France (being the leading nation in the training mission, as well), Spain, Germany, Belgium, United Kingdom, Czech Republic, Poland, Italy, Sweden, Finland, Hungary, Ireland, Austria, Bulgaria, Greece, Slovenia, Lithuania, Estonia, Latvia, Luxembourg, Romania, Portugal and the Netherlands.

The role of France is special in the mission: with more than 200 soldiers deployed, they contribute the most to the success of the programme. However, this is not surprising: since EUTM Mali and the military intervention (Opération Serval) share the same goal – free the northern region and restore the integrity of the country – it is obvious that the two missions are aligned in the same strategy of France.

At the same time, one has to underline that EUTM Mali is about training and giving advice and they do not take part in the combat operations carried out in Azawad – the role of the programme is to enable Malian "official" armed forces to keep order after the departure of the intervening French troops and to be able to avoid similar events in the future.

The mission – so far – has had two commanders; the first is General François Lecointre who led the training mission until August

[20] Conférence de presse à Bamako, available at: http://www.eutmmali.eu /?p=201 [cit. 2013-11-06].

2013. Having 25 years military experience[21] and serving on different crisis venues (first Gulf War, Djibouti during the civil war, Rwanda and Somalia), he was an adequate choice for a mission dealing with a crisis situation in Africa. On 1 August, the command was passed onto General Bruno Guibert who has been in charge of the command of EUTM Mali ever since. According to his professional history, General Guibert also has experience in military actions in Africa, especially in Chad, the Central African Republic, Rwanda and the Ivory Coast. Since France has taken a major role in the mission, it is hardly surprising that both commanders are of French nationality.

The role of France is special in this whole crisis management. Since their economic interests in Northern Africa go back to the colonial era (uranium interests in the neighbouring Niger, for example), the French government reacts sensitively to all incidents in the region; given that the European Union showed "no appetite"[22] for a combat operation under EU flag, President Hollande decided to prevent the further escalation of the conflict, taking action swiftly, thus enabling the multinational African forces to carry out their mission under UNSC Resolution 2085 in order to bring stability to the region.

6. THE TRAINING

Whereas the headquarters are at the capital, the training itself takes place at Koulikoro base, cca. 60 kilometres from Bamako. 550 troops were sent to train the Malian armed forces; out of these about 150 are trainers – the rest of the contingent provide support and serve as a protective force in the mission. Besides the mentioned French troops (207), Germany provided 71 soldiers, Spain contributed with 54, the

[21] See General François Lecointre's CV at: http://eeas.europa.eu/csdp/missions_operations/eutm-mali/ cv/cv_gal_lecointre_en.pdf [cit. 2013-11-06].

[22] COOLSAET, RIK – BISCOP, SVEN – COELMONT, JO: Mali: Another European Intervention without the EU? in *Security Policy Brief*, No. 42. (2013) 1.

UK with 40, the Czech Republic with 34, Belgium sent 25 and Poland 20.[23]

General Lecointre was quite straightforward about the overall condition of the to-be-trained forces: the Malian army possessed poor and "heterogeneous" equipment, donated by richer nations over the last 20 years; "(...) the bigger issue however is the army's lack of a clear hierarchy and chain of command, with little team spirit."[24]

2. Figure The region of Koulikoro[25]

After the first coordinative training for the trainers at the end of March,[26] the basic formation began on 2 April 2013 – when the first

[23] Mali crisis: EU troops begin training mission, in *BBC News*, available at: http://www.bbc.co.uk/news/world-africa-21998398 [cit. 2013-11-17].
[24] EU troops begin Mali training mission, in *Globalpost*, available at: http://www.globalpost.com/dispatch/news/afp/130402/eu-troops-begin-mali-training-mission-0 [cit. 2013-11-17].
[25] Source: http://www.alimaong.org [cit. 2013-11-17].

official Malian battalion arrived at Koulikoro (*see on the map*). Consisting of 600 people, this battalion was the first unit which took part in the training carried out by the European EUTM Mali instructors.[27] According to the plans, the training would last for 10 weeks and comprise several different phases. The battalion officially named itself "Waraba", which means "lion" in the local Bambara language; its chief is Malian Lieutenant Colonel Yacouba Sanogo.

Before any particular training session, the battalion was evaluated during a series of tests in order to obtain information about the soldiers' general physical condition, technical knowledge and their capacity to command.[28] The initial results were positive, meaning that the majority of the battalion had the basics required to begin the training.

Three weeks of individual and group infantry training followed the evaluation, when on 29 April the EUTM Mali entered into a new phase: special training. This phase took 4 weeks and each special training module was carried out by different instructors from different EU countries:[29]

1. Armoured light cavalry: Italy and Slovenia;
2. Artillery: Great Britain;
3. Engineering: Germany;
4. Commando: Spain;
5. Logistics: Poland;
6. Elite snipers: Hungary;
7. Communication: Greece;
8. Aerial control: Italy.

Besides physical and tactical exercises, the battalion also followed courses on international humanitarian law. Lessons were held for an

[26] La formation des formateurs, available at: http://www.eutmmali.eu/?p=423 [cit. 2013-11-17].

[27] Arrivée du premier bataillon Malien, available at: http://www.eutmmali.eu/?p=444 [cit. 2013-11-17].

[28] Evaluation du bataillon WARABA, available at: http://www.eutmmali.eu/?p=584 [cit. 2013-11-17].

[29] Le combat en localité, available at: http://www.eutmmali.eu/?m=201305&paged=2 [cit. 2013-11-17].

hour every week and were adapted to the audience. During these sessions, soldiers discussed real matters concerning humanitarian issues, such as "protection of children in armed conflict situation."[30] Besides that, several United Nations organizations also took part in the humanitarian law courses (e.g. United Nations High Commissioner for Refugees, United Nations Office in Mali, United Nations Population Fund Agency, UNICEF), aiding EUTM Mali with the main objective to "make the Malian soldiers understand and increase their sensibility towards human rights and to the obligations of soldiers in a conflict facing the civil population, women, children, civilian captives and war prisoners."[31]

The training of the "Waraba" battalion ended with a final exercise in the region of Koulikoro where both the Commander of the mission, General Lecointre and the Joint Chief of Staff, General Dembélé were present; the aim of the event was to attest the operational capacity of the battalion. The unit contains 715 members organised into different companies: three infantry and several special units in the fields of cavalry, artillery and engineering. The battalion met the requirements and was put under the command of the Malian Army.[32] On 22 June, the battalion left the Koulikoro training camp and headed towards the northern part of the country to be deployed for the first time in the city of Gao.[33]

On 9 July, the second battalion, appointed by the Malian state, began its training cycle in Koulikoro. The unit was to be commanded by Lieutenant-Colonel Samaké and consisted of three infantry companies, reinforced by a fourth company of specialized support

[30] Le Droit International Humanitaire, available at: http://www.eutmmali.eu/?p=858 [cit. 2013-11-17].
[31] Premières conclusions sur la formation au DIH, available at: http://www.eutmmali.eu/?m=201305 [cit. 2013-11-17].
[32] « Doumba »: exercice de synthèse pour les Waraba, available at: http://www.eutmmali.eu/?p=1061 [cit. 2013-11-17].
[33] EUTM Mali: Départ du bataillon Waraba, available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-mali/news/20130723_fr.htm [cit. 2013-11-17].

units.[34] After the evaluation of the soldiers two weeks of infantry training and a following special training took place. The battalion, named Elou ("elephants" in the language of tamashek) finished their training officially on 14 September[35] they left the training camp on 28 September. The 700 men and 60 vehicles joined the first battalion in Gao and – similarly to their predecessors – was accompanied by a French detachment of operational assistance.[36]

The third battalion arrived at the Koulikoro base on 30 September. The unit was commanded by Lieutenant-Colonel Sangaré; the 720 soldiers who came from the training centre of the Malian armed forces mainly from Markala, completed by elements coming from all Mali.[37] The name of the third battalion is "Sigi", meaning "Buffalo" in Bambara language. The training is currently taking place at the training centre.

7. RECEPTION

The overall support of the programme has been great so far, many prominent representatives visited the training camp: the German Minister of Defense, Thomas de Maizière; the European Union's Special Representative for the Sahel region, Michel Reveyrand de Menthon; the Swedish Minister of Defense, Madame Karin Enström; the Spanish Minister of Defense, Pedro Morenés Eulate; twice the Malian Minister of Defense and Veteran Combatants, Yamousssa Camara; the Spanish Ambassador, Jose Maria Matres Manso; Jean-

[34] Le second bataillon malien entame sa formation à Koulikoro, available at: http://www.eutmmali.eu/?p=1135 [cit. 2013-11-17].
[35] Cérémonie de fin de formation du bataillon Elou, available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eutm-mali/news/20130914_news_fr.htm [cit. 2013-11-17].
[36] Départ du bataillon «Elou», available at: http://www.eutmmali.eu/?p=1540 [cit. 2013-11-17].
[37] Arrivée du 3e bataillon malien à Koulikoro, available at: http://www.eutmmali.eu/?p=1579 [cit. 2013-11-17].

Yves Le Drian, the French Minister of Defense and the Belgian Minister of Defense, Pieter de Crem.

As a token of appreciation for his work, General Lecointre was elevated to the rank of Commander of the National Order of Mali on 31 July.[38]

On 14 October, during a ceremony held in the main Headquarters of the EUTM Mali mission in Bamako, the imposition of the European medal for the security and defence policy took place; all personnel of the mission was near to the completion of their deployment. The event was chaired by the Deputy Commander of the mission, the Spanish Colonel, called Felix Eugenio Garcia Cortijo.[39] EUTM Mali officers were honoured by the Malian Minister of Defence and Veteran Combatants and were appointed as knights of the National Order of Mali.[40]

A considerable emphasis was placed upon the acceptance of the mission among the local populace, as well. The European servicemen of the mission EUTM led a series of actions for the benefit of the population of the city. On 25 October, in co-operation with the local authorities, Colonel Testard, accompanied with trainers of the mission visited four public schools to distribute school effects to children living there. The initiative went on with the projection of a cartoon to the children of a school situated in the outskirts of the city. These two actions were greeted by the teaching profession and the authorities of the city. A new distribution of school kits took place on Monday, 28 October in four other schools of Koulikoro. Altogether, more than 600 school kits were distributed to the children.[41]

[38] Le général Lecointre élevé au rang de Commandeur de l'Ordre National du Mali, available at: http://www.eutmmali.eu/?p=1198 [cit. 2013-11-18].

[39] Cérémonie de remise de la médaille de la politique européenne de sécurité et de défense, available at: http://www.eutmmali.eu/?p=1632 [cit. 2013-11-17].

[40] Officers of EUTM Mali honored, available at: http://www.eutmmali.eu/?p=1085 [cit. 2013-11-17].

[41] Mission EUTM Mali: aide à la population malienne, available at: http://www.eutmmali.eu/?p=1669 [cit. 2013-11-18].

8. CONCLUSIONS

If we want to give a thorough opinion on the success of EUTM Mali, we would not find ourselves in an easy situation. The fact itself that the mission has successfully trained three battalions and is currently under the process of training more is a huge result, without any doubts. On the other hand, forming a solid judgement of the mission now would be quite difficult, since it is currently an ongoing one, set to be finished in the end of May 2014. However, in my opinion we can still make some conclusions of the experiences.

The mission is widely considered to be a success; former commander, General Lecointre even advises that the mandate should be prolonged in order to train the whole of the Malian armed forces. Foreign experts have already welcomed the idea that instead of spending large amount of money on keeping order in occupied territories (e.g. the United States in Iraq and Afghanistan), it is much more profitable to train, thus, enable "domestic" forces to cope with the internal security issues after leaving the area. This measure also makes it possible to prevent that paramilitary forces occupy a part of the country (it was substantially due to the inability of regular forces that Ansar Dine was able to gain influence and set a foothold in Azawad) – and of course, trained Malian forces will be suitable to take part in the combat against international terrorism. Due to the consequences of the "Arab spring", the Maghreb region is also exposed to the security dangers of the transition process (e.g. in Libya until the present day there are grave atrocities in spite of the democratic change after the civil war or, to provide a more recent example, we could mention the civil war-torn Syria as well) so the modernised army will probably play a crucial role in maintaining internal security and fending off terrorist threats.

Although, – fortunately – the "real" test has been "postponed" (the radical Islamic forces had been driven out of the region by French troops by the time the Waraba battalion arrived at the city of Gao) it is nevertheless an important mission for the trained forces to preserve the fragile tranquillity and protect the population in the northern region. We can also see that the peace process can become

unstable as the result of even the slightest tensions; the Tuareg issue will require a political solution but in the meantime it is advisable to be prepared for possible incidents similar to the one happened in the last years.

It is worth emphasizing that, the policy of the European Union can set an example for further crisis management in international conflicts. The EU recognised that long-lasting effects of social and economic development are strongly correlated with internal security and there is no other effective force to maintain that like a domestic one. In my opinion, it is also important to communicate properly towards European citizens why hundreds of millions of euros are spent for an African region and why it is beneficial for the community, as well.

The emphasis on international humanitarian law is also a remarkable feature of the programme – besides social responsibility actions carried out by the trainers, it is also crucial that Malian soldiers respect human rights; this way the population can feel that armed forces fight for them and they are not exposed to harassment or more severe incidents. The efforts to increase the popularity of the foreign forces can also play an important part in the pacification of the region; the transparency of the goals of the international coalition can prevent the Islamists to recreate a base by convincing the local population to support them; a generally great problem encountered while fighting terrorists.

In sum, it can be concluded that it is a welcomed idea to give a helping hand in restoring public order via enabling local forces to combat challenges. However, significant caution will be needed in the near future in order to stabilize the political climate of the country. Democracy must take roots in the governing principles of Mali, otherwise trained soldiers can be easily "redirected" to fight other causes instead of protecting the population by maintaining public order. International organizations, the UN and the European Union should continue to monitor the rebuilding process in the Sahel region.

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Márta PATAKI

Beziehungsgewalt – Der Vergleich der Ungarischen und Österreichischen Regelung

1. VORWORT

> *„Den Prozess der Misshandlung kann man kennenlernen. Daher kann man ihn erkennen, verhindern und durch entschlossene Eingriffe stoppen…"*[1]

Die Gewalt in der Familie ist erst in der zweiten Hälfte des 20. Jahrhunderts zu einem Gegenstand der Aufmerksamkeit geworden, doch das Leben einer Familie, ihre inneren Konflikte sind in dem Schutz der Privatsphere geblieben. Danach hat die Misshandlung in der Familie eine immer größere Aufmerksamkeit auf sich gezogen. Zuerst ist man gegen die Misshandlung von Kindern vorgegangen, dann ist die häusliche Gewalt gegen Frauen in den Vordergrund gekommen. So ist das Thema durch die Kriminalisierung von Beziehungsgewalt eine aktuelle Frage geworden. Doch, "Es ist unbestreitbar, dass die Gewalt in der Familie, das Leiden und die Auslieferung der Opfer von nichts begründet werden können, macht es nicht ertragbar, außerdem sind solche Maßnahmen nötig, die diesen unannehmbaren Qualen vorbeugen oder beseitigen helfen

[1] MORVAI, KRISZTINA: *Terror a családban, A feleségbántalmazás és a jog* [Terror in der Familie, das Frau-Missbrauch und das Recht],1998, Kossuth Verlag, Budapest, 6.

können.“[2] Die selbständige Erscheinung des Tatbestands „Beziehungsgewalt“ kann für die Rechtsanwender in Bezug auf die Bewertung der Beziehungsgewalt als ein Phänomen einen Ansatzpunkt bedeuten, auch wenn das Strafgesetzbuch den Begriff des Verbrechens nicht bestimmt, aber der Rechtsanwender kann während der Aufstellung des Tatbestands die Faktoren verwenden, die während der Forschung als begriffliche Elemente erschienen sind. Diese Straftat werde ich in Bezug auf die Anwendung der durch die Hilfswissenschaften des Strafrechts gebildeten Definition bestimmen. Während der Untersuchung der häuslichen Gewalt müssen wir auf die Typologie, auf die Faktoren, die zur Gewalt führen und auch auf die Ursachen achten, die ein wichtiger Teil der Studie ist. Dabei ist es notwendig, die ungarische Regelung mit einem seit längerer Zeit funktionierenden System vergleichen, und solche Regeln anzuwenden, die mit der historischen Entwicklung von Ungarn, der Situation der häuslichen Gewalt in Ungarn und ihrer beruflichen und wissenschaftlichen Vorgeschichte vereinbart werden können. Deswegen werde ich im Folgenden die österreichische und ungarische Regelung miteinander vergleichen.

2.BEGRIFF, TYPEN

In diesem Kapitel werde ich die Beziehungsgewalt definieren. Es ist nicht einfach, denn unabhänging von der Bezeichnung geht es um die Gewalt in der Familie, die mehrere Typen hat.

[2] HERCZOG, MÁRIA: A családon belüli erőszak kutatásának előzményei – családi viszonyok vizsgálata Magyarországon [Die Vorgeschichte der Forschung der häuslichen Gewalt - die Überprüfung von Familienbeziehungen in Ungarn], in VIRÁG, GYÖRGY (Hg.): *Családi iszonyok – A családi erőszak kriminológiai vizsgálata* [Familienrepulsionen - die kriminal Überprüfung der Familiengewalt], 2005, KJK-KERSZÖV, Budapest, 53.

[3] Gesetz Nr. C. aus dem Jahre 2012. *über das Strafgesetzbuch* (StGB).

Die Typen sind: Die Gewalt gegen Frauen, Männer, die in einem Haushalt lebenden Angehörigen, und die Zulassung der Misshandlung von Kindern. Ein anderer Grund für die Schwierigkeit der Definierung ist, dass sich der Paragraph 212/A[3] des Strafgesetzbuches, meiner Ansicht nach, nicht auf alle Typen der Erschienung bezieht.

Deswegen werde ich die Beziehungsgewalt mit der Definition von Marianne Schwander bestimmen, „Häusliche Gewalt liegt vor, wenn eine Person in einer bestehenden oder einer aufgelösten familiären oder partnerschaftlichen Beziehung in ihrer körperlichen, sexuellen oder psychischen Integrität verletzt oder gefährdet wird und zwar entweder durch Ausübung oder Androhung von Gewalt oder durch mehrmaliges Belästigen, Auflauern oder Nachstellen.“[4] Was die Form der Gewalt angeht gibt es: (1) *Physische Gewalt*, (2) *Sexuelle Gewalt*, (3) *Psychische Gewalt*, (4) *Soziale Gewalt*, (5) *Ökonomische Gewalt*.

> (1) Physische Gewalt: umfasst Schlagen mit und ohne Werkzeuge, Beißen, Würgen, Fesseln, Gegenstände nachwerfen, tägliche Angriffe bis hin zu Tötungsdelikten.
> (2) Sexuelle Gewalt: der Täter von unerwünschten sexuellen Aktivität zwang die Opfer, dazu gehören Vergewaltigung,

[3] Paragraph 212/A (1) Die der Elternteil seines kindes ist und zur Zeit der Kommission oder früher auf Beleidigung von die Person, die mit ihm in einer gemeinsame Haushalt lebt oder der Gehörende einer Person die in der Haus lebt, ehemalige Ehepartner, ehemalige Lebensgefährte, Pfleger, Pfegebefohlene, Vormund oder Münde regelmässig:
a) zeigt eine demütigende, gewaltsame Verhalten, die das menshliche Würde schwierig beleidigt,
b) matriale Güter, die zu der Rund der gemeinsame Wirtschaft oder gemeinsame Vermögen gehören stehlt und der Verletzte hat deswegen eine schwierige Notwendigkeit; Es wird wegen Vergehen durch 2 Jahre lange Freiheitsstrafe gestraft, wenn es keine schwierige verbrechen ist.

[4] SCHWANDER, MARIANNE: *Das Opfer im Strafrecht: seine Stellung allgemein und hinsichtlich spezifischer Straftatbestände*, http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e663/e104289/e104308/e104309/files164022/Folienset24und31Oktober2012_ger.pdf [cit. 2013-10-12].

Zwang zur Prostitution, Vergewaltigung mit Objekt, induzierte Abtreibung mit Gewalt.
(3) Psychische Gewalt: „umfasst sowohl schwere Drohung, Nötigung, Freiheitsberaubung, Auflauern nach einer Trennung (Stalking), als auch Formen, die für sich allein keine unmittelbare Bedrohung darstellen, die aber in ihrer Summe als Gewaltausübung bezeichnet werden müssen. Dazu gehören diskriminierende Gewalt wie Missachtung, Beleidigung, Demütigung, Erzeugen von Schuldgefühlen, Einschüchterung oder Beschimpfung."[5]
(4) Soziale Gewalt: der Opfer wird im gesellschaftlichen Leben durch den Täter beschränkt und unter strenger Kontrolle gehalten.
(5) Ökonomische Gewalt: Zwang zur Arbeit, wie auch die alleinige Verfügungsmacht über finanzielle Ressourcen durch die Partnerin oder den Partner.

3. URSACHEN

Die soziologischen Forschungen haben gezeigt, dass sich die Beziehungsgewalt in breiten Gesellschaftsschichten befindet, aber die weniger gebildeten und ärmeren Schichte der Gesellschaft sind von den Gewaltdelikten öfter betroffen, als die besser gebildeten, unter finanziell besseren Bedingungen lebenden Menschen. Es ist wichtig zu sehen, dass „die biologischen, genetischen und seelischen Unterschiede zwischen den Geschlechtern (...) die Familienverhältnisse, die Normen der Umwelt (...) die soziologische Situation und andere zahllose Ursachen in Bezug auf das Verhältnis zwischen den Geschlechtern"[6] von großer Bedeutung sind.

[5] Ibid.
[6] TAMÁSI, ERZSÉBET: A családon belüli erőszak vizsgálatának története [Das Geshichte der Überprüfung der Gewalt in der Familie], in VIRÁG, GYÖRGY (Hg.): *Családi iszonyok – A családi erőszak kriminológiai vizsgálata* [Familien Abschauen – Die kriminologische Überprüfung der Gewalt in der Familie], 2005, KJK-KERSZÖV, Budapest, 43.

Als erste Ursache der Beziehungsgewalt müssen wir die schlechte finanzielle Lage erwähnen, denn es verursacht oft Konflikte zwischen den Partnern in einer Beziehung. Demzufolge kommt die Beziehungsgewalt in Familien öfter vor, in denen die Partner die Konfliktsituationen schwer oder gar nicht behandeln können.

Als zweite Ursache müssen wir die Arbeitslosigkeit erwähnen, die mit den finanziellen Umständen zusammenhängt. Einerseits kann die Arbeitslosigkeit auch als eine Konfliktquelle bezeichnet werden, andererseits kann der hohe Stand der Arbeitslosigkeit die Erhöhung der Beziehungsgewalt voraussagen.

Die dritte Ursache ist die niedrige Bildung, die sowohl von der Seite des Täters als auch von der des Opfers als ein Risikofaktor erscheinen kann. Eine empirische soziologische Untersuchung hat auch gezeigt, dass „die häusliche Gewalt am häufigsten die im Haushalt tätigen, arbeitslosen, niedrig gebildeten, religiösen, provinziellen Frauen gefährdet."[7]

Als vierte Ursache können wir die Abhängigkeit des Täters betrachten. Hier können wir die Drogen-, Alkoholabhängigkeit oder Spielleidenschaft erwähnen. Die Abhängigkeit „ist die Quelle fast jedes Konfliktes in der Familie, sie kann sogar als ein mit großer Wahrscheinlichkeit auftretender Beweggrund bezeichnet werden."[8] Ein Beweis dafür ist das Ergebnis einer Statistik, in der die befragten Frauen, die von ihren alkoholsüchtigen Partnern regelmäßig misshandelt wurden, ein Verbrechen gegenüber ihren Partnern ausgeübt haben, waren selbst alkoholabhängig.

Es muss festgestellt werden, dass die Beziehungsgewalt nicht nur die Manifestation einer kriminellen Handlung ist, sondern auch das Ergebnis der schlechten Konfliktbehandlung in der Beziehung,

[7] Ibid. 45.

[8] WINDT, SZANDRA: A rokonok sérelmére elkövetett bűncselekmények jellemzői [Die Merkmalen der Verbrechen, die gegen verwandten behen], in VIRÁG, GYÖRGY (Hg.): *Családi iszonyok – A családi erőszak kriminológiai vizsgálata* [Familien Abschauen – Die kriminologische Überprüfung der Gewalt in der Familie], 2005, KJK-KERSZÖV, 264.

wo alle Familienmitglieder in irgendeiner Form betroffen sind. Deshalb ist es notwendig, während der Behandlung des Problems nicht nur die Konsequenzen sondern auch die Vorgeschichte der Gewalt zu untersuchen.

4. DIE URSACHEN DES GESCHICHTLICHEN VERGLEICHS

In diesem Kapitel können wir darauf eine Antwort bekommen, warum der Vergleich der ungarischen und österreichischen Regelung gründlich ist. Bevor die Beziehungsgewalt als selbstständiger Tatbestand in das Strafgesetzbuch aufgenommen wurde, waren die zwei Regelungen nicht so unterschiedlich. Ein gutes Beispiel dafür ist das V. Gesetz vom Jahr 1961., das im Vergleich zu den Anfängen die einzelnen Gewaltdelikte in der Familie in breiteren Rahmen umfasst hat. Solche Verbrechen waren, „Straftat gegen Jugendliche 274. § (1) Die Person, die die körperliche, seelische oder moralische Entwicklung der Minderjährigen gefährdet, ist mit einer Freiheitstrafe bis zu drei Jahren zu bestrafen. (2) Wenn eine Straftat mit größerem Ausmaß nicht Zustande kommt, muss die volljährige Person auch bestraft werden, die die Minderjährigen zum Verbrechen oder zu einer unzüchtigen Lebensweise bewegt, oder die Absicht hat, sie dazu zu bewegen.“[9] An dieser Stelle kommt der Begriff „Die Unterlassung der Verpflichtung zur Fürsorge“ ins Strafgesetzbuch, 275. § (1) Die Person, die ihre in dem Gesetz geregelten und von der Behörde vorgeschriebene fürsorgliche Verpflichtung aus eigener Schuld nicht erfüllt, wird mit einer Freiheitsstrafe bis zu einem Jahr oder mit Erziehungsarbeit bestraft. Die Person, die durch einen rechtlichen Bescheid des Gerichts, auch ohne die Festsetzung der Vaterschaft, zu der Versorgung des Kindes verpflichtet ist und diese Verpflichtung aus eigener Schuld nicht erfüllt, muss auch bestraft werden. (3) Die Strafe ist eine

[9] Gesetz Nr. V. aus dem Jahre 1961. über die Ungarische Volksrepublik Strafgesetzbuch.

Freiheitsstrafe bis zu drei Jahren, wenn der Täter a) rückfällig ist; b) oder seine fürsorgliche Verpflichtung wegen seiner unzüchtigen Lebensweise nicht erfüllt hat; c) wegen der Unterlassung seiner Verpflichtungen die Versorgten zur Entbehrung ausgesetzt hat. (4) Wegen der Unterlassung der Verpflichtung zur Fürsorge kann die Person nicht bestraft werden, wenn er bis zur Fällung des Urteils ersten Grandes seine Verpflichtungen erfüllt hat." Das IV. Gesetz vom Jahr 1978 hat die Formulierungen des vorherigen Strafgesetzbuches in vollem Maße interpretiert. Ähnlicherweise hat das österreichische Strafgesetzbuch durch ähnliche Bestände die Frage geregelt, wie zum Beispiel die Verletzung des Unterhaltspflichtes (1) Wer sich einer gesetzlichen Unterhaltspflicht entzieht, so daß der Lebensbedarf des Unterhaltsberechtigten gefährdet ist oder ohne die Hilfe anderer gefährdet wäre, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. (2) Wer einer Schwangeren zum Unterhalt verpflichtet ist und ihr diesen Unterhalt in verwerflicher Weise vorenthält und dadurch den Schwangerschaftsabbruch bewirkt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.[10]

Obwohl die Beispiele zeigen, dass die Gewalt in der Familie seit langem ein Problem ist, konnte eine Volksinitiative erst im Jahr 2010 erreichen, dass dieses Verbrechen als selbständiger Bestand in das Strafgesetzbuch aufgenommen wurde. Meiner Meinung nach haben sich die Straftatbestände in dem Strafgeseztbuch auf alle Straftaten bezogen, die zu dem Begriff „Gewalt in der Familie" gehören, aber wegen der Einstellung der Gesellschaft sollte dieses Verbrechen zur Geltung kommen. Wir konnten Vorschläge darüber lesen, dass der Tatbestand der seelischen Misshandlung in das Strafgesetzbuch aufgenommen werden sollte, aber sie wurden von den Rechtgsebern abgelehnt, mit Bezug darauf, dass es schwer bezeugt werden könne. Die Frage der Gewalt in der Familie ist problematisch. Einerseits gibt es keinen einheitlichen Begriff, anderseits ist die Einstellung der Gesellschaft immer noch negativ. Drittens ist es auch aufgrund der Anordnungen der Polizeipräsidenten zu sehen, dass es eine große

[10] Österreichische StGB. 170. §.

Zahl von Straftaten umfasst, deshalb ist es schwer festzustellen, wie die Gewalt in der Familie definiert werden kann, und auch wenn es gelingt, kann es vorkommen, dass er die gewünschte Wirkung nicht erreichen kann. Deswegen sollte diese Straftat meiner Meinung nach nicht in dem Strafgesetzbuch geregelt werden. Wie Lenke Fehér schrieb "In der EU, als ein effizientes und nachahmenswertes Beispiel, wird generell das durch das Duluth-Modell geschaffene und auch in der Praxis gut funktionierende österrechische Modell vorgezeigt."[11] Deswegen könnten wir meiner Meinung nach gegen die Täter durch die Anwendung der österreichischen Regelung viel effizienter auftreten. Die österreichische Reform legt einen großen Wert auf die Forschung und formuliert die folgenden Grundprinzipien. 1. Die Gewalt in der Familie ist kein privates oder familiäres Problem, sondern eine öffentliche Angelegenheit. 2. Der Anspruch der Bedrohten an Sicherheit ist vorrangig. 3. Die Suche nach Lösungen geschieht in dem Bewusstsein, dass die Gewalt nicht durch einzelne Situationen hervorgerufen wird, sondern ihre Wurzeln sind in der Beziehung zu finden. 4. Der Anspruch an Null- Toleranz. 5. Die Betonung der Verantwortung des Täters. 6. Die Notwendigkeit der holistischen Annäherung, die sich auf mehreren Institutionen beruht.[12] Dafür gibt es auch Beispiele, dass der Begriff Gewalt in der Familie in dem Strafgesetzbuch geregelt wird, aber meiner Ansicht nach würde das Verbrechen solcher Art nur durch dessen Regelung in einem eigenen Tatbestand zur Geltung kommen. Das könnte zu der positiven Einstellung der Gesellschaft und der Behörde führen. Außerdem könnten die schon existierenden Hilfsorganisationen gegen dieses Verbrechen viel effizienter auftreten. Ich halte es für wichtig, diese Regelung laut der österreichischen Regelung zu

[11] FEHÉR, LENKE: Családon belüli erőszak – nemzetközi dokumentumok és gyakorlat [Der Gewalt in der Familie – international Dokuments und Praktikum], in VIRÁG, GYÖRGY (Hg.): *Családi iszonyok - A családi erőszak kriminológiai vizsgálata* [Familien Abscheuen – Die Kriminilogische Untersuchung des Gewalt in der Familie], 2005, KJK-KERSZÖV, Budapest, 102.
[12] Ibid. 102.

regeln, denn es legt Grundprinzipien fest, die gefolgt werden sollten und von dem derzeitigen ungarischen System in Form einer gut funktionierenden Ordnung implementiert werden könnten.

5.DIE ÖSTERREICHISCHE UND UNGARISCHE REGELUNG

Obwohl das österreichische Strafgesetzbuch keinen selbstständigen Tatbestand in Bezug auf die Beziehungsgewalt enthält, wurde dieses Verbrechen in das ungarische Strafgesetzbuch aufgenommen. Das Strafgesetzbuch bestraft die Gewalt in der Familie durch mehrere Tatbestände. Zuerst können wir uns mit solchem Tatbestand in dem Dreizehnten Abschnitt treffen, in dem Fall von Strafen gegen die Sexuelle Selbstbestimmung im Rahmen des Sexuellen Missbrauchs von Schutzbefohlenen.[13] Das bezieht sich auf Personen unter 18

[13] StGB. 174. § – Sexueller Mißbrauch von Schutzbefohlenen:
(1) Wer sexuelle Handlungen
1. an einer Person unter sechzehn Jahren, die ihm zur Erziehung, zur Ausbildung oder zur Betreuung in der Lebensführung anvertraut ist,
2. an einer Person unter achtzehn Jahren, die ihm zur Erziehung, zur Ausbildung oder zur Betreuung in der Lebensführung anvertraut oder im Rahmen eines Dienst- oder Arbeitsverhältnisses untergeordnet ist, unter Mißbrauch einer mit dem Erziehungs-, Ausbildungs-, Betreuungs-, Dienst- oder Arbeitsverhältnis verbundenen Abhängigkeit oder
3. an seinem noch nicht achtzehn Jahre alten leiblichen oder angenommenen Kind vornimmt oder an sich von dem Schutzbefohlenen vornehmen läßt, wird mit Freiheitsstrafe von drei Monaten bis zu fünf Jahren bestraft.
(2) Wer unter den Voraussetzungen des Absatzes 1 Nr. 1 bis 3
1. sexuelle Handlungen vor dem Schutzbefohlenen vornimmt oder
2. den Schutzbefohlenen dazu bestimmt, daß er sexuelle Handlungen vor ihm vornimmt, um sich oder den Schutzbefohlenen hierdurch sexuell zu erregen, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.
(3) Der Versuch ist strafbar.
(4) In den Fällen des Absatzes 1 Nr. 1 oder des Absatzes 2 in Verbindung mit Absatz 1 Nr. 1 kann das Gericht von einer Bestrafung nach dieser

Jahren. Außerdem bestimmt der Gesetzgeber den Begriff Misshandlung von Schutzbefohlenen in dem Siebzehnten Abschnitt über die Straftaten gegen die körperliche Unversehrtheit. Dieses Verbrechen bezieht sich auf Personen, die minderjährig sind, oder die sich wegen ihrer Behinderung oder Krankheit nicht verteidigen können. Das Strafgesetzbuch legt einen höheren Wert auf den Schutz von Jugendlichen und Personen, die sich nicht verteidigen können. Das ungarische Strafgesetzbuch versuchte die Zahl der möglichen Opfer und die Formen der Gewalt solcher Art durch die Kriminalisierung des Tatbestands von Beziehungsgewalt zu mindern. Der Tatbestand enthält nicht den Begriff der seelischen Gewalt, denn die Beweisführung dieses Verbrechens problematisch sein kann.

Obwohl das österreichische Strafgesetzbuch nicht den Tatbestand der Beziehungsgewalt enthält, regelt ein eigenes Gesetz, das Gewaltschutzgesetz, den Schutz gegen die Gewalt in der Familie. Das Gesetz verordnet, dass das Gericht im Interesse der verletzten Person verschiedene Maßnahmen treffen kann. Die Maßnahmen umfassen die Tätigkeiten, die die körperliche Unversehrtheit, Gesundheit, Freiheit der Person verletzt. Der Richter kann verbieten, dass der Täter in das mit dem/der Verletzten gemeinsam benutzte Haus tritt oder mit dem/der Verletzten kommuniziert oder ihn/sie trifft. Das Problem mit diesen Maßnahmen ist, dass sie nur in dem Fall verwendet werden können, wenn sie das rechtliche Interesse des Täters nicht verletzt. Das rechtliche Interesse muss nicht berücksichtigt werden, wenn der Täter den Verletzten mehrmals belästigt oder sein Leben, körperliche Unversehrtheit schwierig bedroht, bzw. das Leben oder das Vermögen der mit dem Verletzten in einem Haushalt lebenden Person gefährdet. Der Richter kann außer den erwähnten Maßnahmen verordnen, dass der Täter an einer Behandlung teilnimmt, die bei der Bekämpfung der Alkoholabhängigkeit oder seelischen Krankheiten hilft. In dem Gewaltschutzgesetz sind solche

Vorschrift absehen, wenn bei Berücksichtigung des Verhaltens des Schutzbefohlenen das Unrecht der Tat gering ist.

Fälle zu finden, wo der Täter und der/die Verletzte langfristig in einem zusammen geführten Haushalt gelebt haben, aber der Täter muss das Haus verlassen, auch wenn er der Inhaber ist. In diesem Fall steht ihm Schadenersatz zu, wenn das Gericht es gerecht findet.[14] Im Vergleich dazu ist der Tatbestand der Beziehungsgewalt in der ungarischen Regelung am 30. Juni 2013. in Kraft getreten, und dadurch wurde er in dem Strafgesetzbuch als selbständiger Tatbestand definiert. Das ungarische Rechtssystem schützt die Opfer der Beziehungsgewalt durch das im Jahre 2009. geschaffene LXXII. Gesetz, das sich auf die Gewalt unter Angehörigen bezieht und gegenüber dem Täter eine Wegweisung anordnen kann. Diese Regelung ist sehr ähnlich zu der des österreichischen Gewaltschutzgesetzes. Das ungarische Gesetz erwähnt auch eine einstweilige Wegweisung, die in dem österreichischen Gesetz als Wegweisung oder bzw. Betretungsverbot bezeichnet ist. Das wird in beiden Fällen von der Polizei erlassen. Laut der österreichischen Rechtsordnung kann es für 2 Wochen angeordnet werden, und um 2 Wochen verlängert werden. In der ungarischen Regelung gilt es nur für 72 Stunden. Im Fall der ungarischen Rechtsordnung muss man einen privaten Vorschlag einreichen, um mit der Prozedur beginnen zu können. Laut der österreichischen Regelung wird das Betretungsverbot von der Behörde angeordnet. Außerdem regeln beide Rechtsordnungen das Institut von einstweiliger Anordnung, die in dem österreichischen Gesetz einer vorläufigen Maßnahme entspricht. Die Einstweilige Verfügung kann in dem Fall einer Prozedur, die von Amts wegen oder auf Antrag eingeleitet wird, von dem Gericht erlassen werden. „16. § (1) Die einstweilige Wegweisung wird angeordnet, wenn man aufgrund aller Umstände, insbesondere der Tatsachen, die von dem Opfer und dem/der Gewalttäter/in beschrieben wurden, des Verhaltens des/der Gewalttäters/in und des Opfers, und andere Signale, die eindeutig

[14] Gewaltschutzgesetz 2. § *(5) Der Täter kann von der verletzten Person eine Vergütung für die Nutzung verlangen, soweit dies der Billigkeit entspricht.*

auf die Ausübung der Gewalt zwischen den Angehörigen hinweisen."[15]

Die einstweilige Wegweisung gilt vorerst 30 Tage. In dem österreichischen Gesetz, „Die EV muss am Bezirksgericht Ihres Wohnsitzes beantragt werden. Sie können den Antrag schriftlich oder am Amtstag mündlich einbringen. Eine EV kann beantragt werden, wenn körperliche Gewalt oder Drohungen mit Gewalt vorliegen und dadurch das Zusammenleben oder das Zusammentreffen mit der Gewalt ausübenden Person unzumutbar ist. Auch bei psychischer Gewalt kann eine EV beantragt werden, wenn dadurch die psychische Gesundheit erheblich beeinträchtigt wird. Alle Personen, die in ihrem Wohnbereich und/oder in ihrem persönlichen Lebensbereich Gewalt erleiden, z.B. durch den Ehemann, Lebensgefährten, Ex-Partner, Freund oder Ex-Freund, Vater oder durch eine andere Person. Ein Familienverhältnis mit dem Gefährdeten ist keine Voraussetzung.)"[16] Die vorläufigen Maßnahmen können, im Gegensatz zu der ungarischen Regelung, in dem Fall von seelischer Gewalt verwendet werden und diese Frist ist auch länger, denn es kann an Orten außer des Wohnortes höchstens für 1 Jahr angeordnet werden, die verlängert werden kann. Also es kann auf Grund der Gesagten festgestellt werden, dass die zwei Regelungen auch trotz des Mangels des Tatbestands in dem österreichischen Gesetz sehr ähnlich sind. Der Unterschied kann in Bezug auf den Zeitraum festgelegt werden, und laut der österreichischen Regelung wird die Prozedur in dem Fall dieser Gewaltdelikten unabhängig von ihrer Gewichtigkeit immer von Amts wegen eingeleitet. Im Gegensatz dazu verlangt die ungarische Regelung einen privaten Antrag als notwendige Vorbedingung für den Beginn des Verfahrens in dem Fall eines Verbrechens von geringer Wichtigkeit.

[15] Gesetz Nr. LXXII. aus dem Jahre 2009. über wegen der Gewalt zwischen den Verwandten anwendbarer Verhalten.

[16] LOGAR, ROSA: *Recht auf Schutz und hilfe für opfer von Gewalt*, 2009, Manz Crossmedia, Wien, 4.

6. ZUSAMMENFASSUNG

Es kann also festgestellt werden, dass die Beziehungsgewalt ein bedeutendes gesellschaftliches Problem unserer Zeit ist, deswegen musste der Rechtsgeber eine Lösung auf dieses Problem finden. Die Lösung war die Kodifikation des Tatbestands von Beziehungsgewalt im Strafgesetzbuch, die meiner Meinung nach die entsprechende Wahl ist, denn der selbständige Tatbestand dem Rechtsanwender für der Schutz der Opfer eine einheitliche Struktur sichern kann. Außerdem ergänzt das LXXII. Gesetz vom Jahr 2009 über die Wegweisung aufgrund der Gewalt den Tatbestand Beziehungsgewalt, die eine bedeutende Übereinstimmung mit der österreichischen Regelung zeigt. Der Tatbestand der Beziehungsgewalt umfasst nicht die seelische Gewalt, deren Fassung in den Tatbestand wäre meiner Meinung nach wegen der Schwierigkeiten der Beweisführung unmöglich. Es ist wichtig festzustellen, dass wir nicht nur in dem Bereich der rechtlichen Regelung nach Lösungen suchen, und uns auf den Schutz der Verletzten konzentrieren sollen, sondern wir sollen auf die Verbesserung der Konfliktbehandlung der Täter auch einen großen Wert legen. Den Umständen entsprechend, die im Zusammenhang des Verbrechens ans Licht kommen, kann eine Behandlung oder eine Therapie dem Täter bei der Prävention von Aggressionen und Konfliktüberwindung helfen. Meiner Ansicht nach können die Aufgaben im Zusammenhang mit der Kriminalprävention in Bezug auf die Gewalt in der Familie, die in der Ordnung 32/2007 des Landes-Polizeihauptmannschaftes formuliert sind, eine gute Richtung sein, um gegen die Beziehungsgewalt in der Familie effektiv auftreten zu können, denn es hebt die informierende Rolle der Polizei bei der Vorbeugung der Beziehungsgewalt hervor.

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[3] LOGAR, ROSA: *Recht auf Schutz und hilfe für opfer von Gewalt*, 2009, Manz Crossmedia, Wien.

[4] MORVAI, KRISZTINA: *Terror a családban, A feleségbántalmazás és a jog* [Terror in der Familie, das Frau-Missbrauch und das Recht],1998, Kossuth, Budapest.

[5] SCHWANDER, MARIANNE: *Das Opfer im Strafrecht: seine Stellung allgemein und hinsichtlich spezifischer Straftatbestände,* http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e663/e104289/e104308/e104309/files164022/Folienset24und31Oktober2012_ger.pdf [cit. 2013-10-12].

[6] TAMÁSI, ERZSÉBET: A családon belüli erőszak vizsgálatának története [Das Geshichte der Überprüfung der Gewalt in der Familie], in VIRÁG, GYÖRGY (Hg.): *Családi iszonyok – A családi erőszak kriminológiai vizsgálata* [Familien Abschauen – Die kriminologische Überprüfung der Gewalt in der Familie], 2005, KJK-KERSZÖV, Budapest.

[7] WINDT, SZANDRA: A rokonok sérelmére elkövetett bűncselekmények jellemzői [Die Merkmalen der Verbrechen, die gegen verwandten behen], in VIRÁG, György (Hg.): *Családi iszonyok – A családi erőszak kriminológiai vizsgálata* [Familien Abschauen – Die kriminologische Überprüfung der Gewalt in der Familie], 2005, KJK-KERSZÖV, Budapest.

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[1] Gesetz V. aus dem Jahre 1961. über die Ungarische Volksrepublik Strafgesetzbuch.
[2] Nr. LXXII. aus dem Jahre 2009. über wegen der Gewalt zwischen den Verwandten anwendbaren Ferhalten.
[3] Gesetz Nr. C. aus dem Jahre 2012. üder das Strafgesetzbuch.

Österreichische rechtsquellen:

[1] Strafgesetzbuch.
[2] Gewaltschutzgesetz.

Alex PONGRÁCZ

The Tropes of Globalization

1. INTRODUCTION

Due to certain changes in the economy and society that have taken place in the last couple of decades, we meet the concept of globalization as a factor of relevance and thematic influence in scientific discourse, political debates, and even daily life. The phenomenon called globalization; or rather tendencies at work behind it have become a permanent point of reference – just like "information-based society". These "popular" buzzwords, however, have been overused to some extent in the past few years. According to *József Veress*' opinion, both promoters and critics of "globalization" use this word to describe a conglomeration of phenomena that is not simply false but it is the very source of comprehension failures.[1] Globalization itself has no universal, "legitimate" definition accepted across the board, and certain authors have not yet managed to reach consensus on even a minimum of standard issues[2].

Nevertheless, a few tropes of globalization can be identified and mapped relatively easily. In this essay, the author is intended enumerate these and give a brief description of each of them. Thus, it is worth mentioning that the following tropes will be analyzed:

[1] VERESS, JÓZSEF (ed.): *Gazdaságpolitika a globalizált világban* [Economic Policy in the Globalized World], 2009, Typotex Kiadó, Budapest, 157. *Veress*'s opinion is an economy-based approach.

[2] TÖRÖK, GÁBOR: Globalizáció – kereskedelmi jog [Globalization – Commercial Law], in *Prudentia Iuris Gentium Potestate. Ünnepi tanulmányok Lamm Vanda tiszteletére* [Prudentia Iuris Gentium Potestate. Essays in Honour of Vanda Lamm], 2010, MTA Jogtudományi Intézete, Budapest, 485.

establishment and traits of the network state; peculiarities of relations between transnational capitalist corporations and nation states; question of the "borderless world"; and adoption of demands of the neoliberal economic political worldview as a state ideology.

2. THE MOST IMPORTANT TRAITS OF THE NETWORK STATE

It was *Manuel Castells* who coined the term "network state" and first analyzed its most important attributes; he did his research on the crisis of the classic nation state as a process spurred on by the rise of the information society, and the changes leading to and triggered by the emergence of "postnational" network state.[3] His thesis is that following the obsolescence of the Westphalian paradigm, the nation state is no longer the sole source of authority. And on top of this, nation states have the unsavory task of legitimizing "governing processes" above each nation. By our time, nation states are rivalled by, among others, corporate, communication, and criminal networks, international organizations, supranational military corporations, non-governmental organizations, religions, and even certain social movements.[4] This enumeration – while not being exhaustive – can be set in parallel to *Malcolm Bull*'s "list", who gave the following answer when asked to list the rivals on nation states: civilizations, intergovernmental relations, NGO-s, churches, international organizations, academic networks, drug cartels, and al-Kaida, as well.[5]

The main attribute of nation states is that within the framework on global capitalism, while they can be expected to survive for a long time, they will be degraded to the level of nexus points for other,

[3] CASTELLS, MANUEL: *Az identitás hatalma. Az információ kora. Gazdaság, társadalom és kultúra.* II. kötet [The Power of Identity, The Information Age: Economy, Society and Culture Vol. II.], 2006, Gondolat – Infonia, Budapest, 416. (Translators: *Berényi Gábor* and *Rohonyi András*).
[4] Ibid. 417.
[5] BULL, MALCOLM: Kell egy kis államszünet? [States of Failure], in *Fordulat*, Vol. 6. (2009) 176.

wider power structures. They meet other players in the "global arena" very often and this situation often forces them to yield, as these new players are often successful in demolishing the reputation of the state. "Nation states can retain their decision-making capabilities but, since they have become part of network of powers and counter-powers, they are dependent on a wider context of authority and influence. (...) We need to conceptualize the new power structure, beyond the framework of the powerless nation state, as an ability to supervise global instrumental networks based on specific identity or, from the point of view of global networks, an ability to suppress any identity in order to accomplish supranational instrumental goals."[6]

Thus, nation states can be said to have been "trapped" in networks and they cannot free themselves from this trap without a compromise. Without a doubt, the traditional, *Bodin*ian sovereignty of nation states[7] is becoming more and more malleable; and in parallel to this the state is forced to revise its concept of authority that has been predominant for centuries. *Wolfgang Sachs* is ultimately right in stating that the Westphalian system, the construct of area-limited sovereign nation state has to be completely deconstructed within the process of globalization.[8] In 21st century conditions the world and within it each nation state is becoming both the subject and object of feedback loops and interdependence – isolation, small "refuges of sovereignty" has ceased to be the guiding principle of international relations.[9]

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[6] CASTELLS: *op. cit.* (2006) 417-418.

[7] BODIN, JEAN: *Az államról* [About the State], 1987, Gondolat Kiadó, Budapest, 115-122.

[8] SACHS, WOLFGANG: Fejlődés: Egy eszme tündöklése és bukása [Development: The Rise and Decline of an Ideal], in SCHEIRING, GÁBOR – BODA, ZSOLT: (ed.): *Globalizáció és fejlődés. Kritikai fejlődéstanulmányok szöveggyűjtemény* [Globalization and Development. Critical Development Studies Reader], 2011, Védegylet – Új Mandátum Könyvkiadó, Budapest, 69.

[9] GALLÓ, BÉLA: A globalizáció „világrendje". Nemzetközi politikai viszonyok az ezredfordulón [The "World Order" of Globalization. International Political Relations at the turn of the Millennium], in CSÁKI,

The state cannot ignore the triumph of information-based production,[10] spurred on by the lightning-speed advancement in communication and other technologies, the financial worldwide web has gained tremendous influence, and its online interface literally blurs borders and circumspects nation states. Thus, this network is capable of directing global financial processes independently of national borders and state authorities,[11] which makes the financial transaction mechanism, instead of the real economy, the "lord" above international economic matters.

In conclusion we can state that *Castells* does not deny public state authority, only dissolves it in the concept of the network state, as in his view the only truly sustainable form of political management (government) is the network state, that is, a conglomerate entity containing nation states, international organizations, cooperations of nation states, regional and local governing bodies, and non-governmental organizations.[12] This entity is authorized to discuss, manage and solve global, national, and local issues. So, nation states are still players in the global arena, it is just that they are no longer "sovereign subjects" or main forces – instead, they have been transformed into formidable but no longer all – powerful strategic players.

GYÖRGY – FARKAS, PÉTER (ed.): *A globalizáció és hatásai. Európai válaszok* [Globalization and Its Effects, European Answers], 2008, Napvilág Kiadó, Budapest, 62.

[10] CASTELLS, MANUEL: *A hálózati társadalom kialakulása. Az információ kora. Gazdaság, társadalom, kultúra.* I. kötet [The Rise of the Network Society., The Information Age: Economy, Society and Culture Vol. I.], 2005, Gondolat-Infonia, Kalocsa, 52. (Translator: *Rohonyi András*)

[11] FORGÁCS, IMRE: *Európa elrablása 2.0. Adalékok a pénzügyi válságok politikai gazdaságtanához* [The Ravishment of Europe, Version 2.0. Contributions to the Political Economy of the Financial Crises], 2012, Gondolat Kiadó, Budapest, 14.

[12] CASTELLS: *op. cit.* (2006) 424.

3. RELATIONSHIP BETWEEN TRANSNATIONAL CORPORATIONS AND THE STATE

Transnational corporations (TNCs) have become seriously powerful entities with actual influence. Simai defines transnationalisation as a process starting from the decision centres of international corporations growing independent of national interests, where transactions within national economies are subordinated to the interests of global corporations, thus, certain areas of national production and service sectors are integrated into global corporate systems.[13] Due to the huge concentration of production and capital, the global spread and significant presence of TNC-s in peripheral and semi-peripheral states, and the growing role of financial speculation, the economical maneuverability of national governments is obviously decreasing and becoming internationalized. Older economic management systems (and *Keynes*ian solutions in economic policy) are being consciously weakened and even the complete relegation of certain economic policy functions into the hands of international organizations is possible.[14]

Early precursors of the phenomenon of global capitalism have already been identified in the seminal work of *Rudolf Hilferding* written during the World War I.; as he defined certain cartels and trusts as power conglomerates which can utilize actual power and authority – even stronger than the state itself.[15] *Karl Kautsky* in 1915 also painted the picture of a "Utopian" world where the role of the state is usurped by executive committees of monopoly corporations –

[13] SIMAI, MIHÁLY: Kihívások, alternatívák és útvesztők a globalizálódó világban [Challenges, Choices and Mazes in the Globalising World], in BAYER, JÓZSEF – LÉVAI, IMRE (ed.): *Globalizációs trendek. Tanulmányok.* [Trends of Globalizations. Studies], 2003, MTA Politikai Tudományok Intézete, Budapest, 62.

[14] FARKAS, PÉTER: Röviden a globalizáció fogalmáról [On the Concept of Globalization in Brief], in CSÁKI – FARKAS: *op. cit.* 16.

[15] SZIGETI, PÉTER: *Az út maga a cél. Társadalomelméleti tanulmányok* [Destination is the Way. Theories of Social Studies], 1995*,* MTA Politikai Tudományok Intézete, Budapest, 288.

he called this phenomenon "ultraimperialism". "Ain't it possible that the current imperialist policy would be replaced by a new, ultraimperialist one; that said, will not the constant internal competition of national financial capital be made obsolete by an internationally incorporated financial capital, which unites to enslave the world? Such a new era of capitalism is at least conceivable."[16]

Such statements do not even seem so ridiculous nowadays. According to statistical data, the commercial profit of the top 200 transnational companies in the world exceeded the ¼ of the total GDP of the world in 1999; the commercial profit of these TNC-s is larger than the GDP of all other countries; also in 1999, it exceeded eighteenfold the entire yearly income of the poorest part of the world's population, who shall live on 1 dollar a day (this refers to about 1.2 billion people). The 82 American corporations that made it into the top 200 supported the candidates of the 2000 election with 33 billion dollars, which is the same amount as two thirds of Hungary's GDP.[17] And there is this: the top 200 global corporations realized 3046 billion dollars turnover in 1982, which made up 24% of the world's entire production (12 600 billion dollars) at that time. By 1992, sales value has reached 5862 billion dollars, which meant 26.8% of the world's entire production at the time.[18]

TNCs do not consider national interests when they exist and do their businesses. They operate in areas of production, services (especially communication, information, banking and insurance services), and sales – and infiltrating these areas, they actually practice a "global" company policy.[19] Today, the formerly popular aphorism from *Charles E. Wilson*, "whatever is good for General

[16] KAUTSKY, KARL: *Die Neue Zeit*, No. 5, April 30, 1915, 144.
[17] CSÉFALVAY, ZOLTÁN: *Globalizáció 1.0.* [Globalization Version 1.0], 2004, Nemzeti Tankönyvkiadó, Budapest, 211-212.
[18] KHOR, MARTIN: Globalization and the South. Some Critical Issues. in *UNCTAD Discussion Papers*, No. 147. (2000), UNCTAD, Genova, 4.
[19] SZENTES, TAMÁS (ed.): *Fejlődés. Versenyképesség. Globalizáció.* I. Kötet [Development. Competitiveness. Globalization. Vol. 1.], 2005, Akadémiai Kiadó, Budapest, 69.

Motors is good for America",[20] cannot be regarded as obvious truth. In the interpretation of *Nye* and *Kenohane*, transnational companies react to the absence of global government[21] by creating their own "forms of government" (the example mentions airlines and alliances between IT companies established in order to gain advantages on the market). Thus, the most significant standardization processes take place in the private sector.[22]

States have to aim for establishing and maintaining good relations with transnational corporations – not in the least because these companies have a huge potential for creating jobs –, but there should be a globally effective regulative system as well, which, based on national labour jurisdiction, would supervise and guarantee a framework of rules applicable to the employees of TNCs and, on the other hand, representatives of TNCs acting as employers. A prerequisite of using such a system, of course, is an agreement between the states, transforming the thus constructed code of law into national legal order. In the absence of this, the author would deem a directive necessary issued by the International Labour Organization (ILO) which lays down the minimal guaranteed rules and has full validity regarding all transnational corporations.

4. THE BORDERLESS WORLD

The phenomenon of the so-called "borderless world"[23] is inextricably

[20] LYKE, H. JOHN: *The Impotent Giant. How to Reclaim the Moral High Ground of America's Politics,* 2008, IUniverse, Bloomington, 186.
[21] STIGLITZ, JOSEPH E.: *A globalizáció és visszásságai* [Globalization and Its Discontents], 2003, Napvilág Kiadó, Budapest, 39. (Translators: *Gavora Zsuzsanna* and *Orbán Gábor*)
[22] NYE, JOSEPH S. – KEOHANE, ROBERT O.: Introduction, in NYE, JOSEPH S. – DONAHUE, JOHN D. (ed.): *Governance in a Globalizing World,* 2000, Visions of Governance for the 21st Century – Brookings Institution Press, Cambridge – Washington, 22.
[23] CLARK, IAN: A "Borderless World?", in FRY, GREGG – O' HAGAN, JACINTA (ed.): *Contending images of World Politics,* 2000, London, Macmillan.

tied to regionalization and the marginalization of traditional national sovereignty. *Kenichi Ohmae* in a comment about the obsolescence of the nation state concept actually urged to get rid of this concept altogether and replace it with something else. In his view this would be a category called "regional state". According to this view, regional states are physical area units that constitute natural economic entities in the borderless global economy, therefore, they are not necessarily defined by national borders. His examples of such regional states are the North of Italy, Baden-Württemberg, Wales and the Silicon Valley. In these cases, population rate is completely irrelevant, the point is what sort of a role the given economic unit plays in the global economy.[24]

David Held, in his classic about globalization, mentioned a few phenomenons that modern states have to face during their daily operation. These include the increasing necessity of accomplishing traditional state tasks through utilizing international cooperation, and the increasing intensity of inter-state integration.[25]

The image of the borderless world, by the way, has mostly economic connotations. Under the control of global regulative powers that favor the neoliberal model such as the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO), the thought of globalization being necessary has gradually gained wide acceptance. The globalization of markets needed a framework of unified regulations for international commerce. The new players have totally twisted the traditional argument that economic relations relied upon regarding trade and monetary relations between sovereign nation states.[26]

For the first time after World War II, global international organizations appeared, which not only established general goals for

[24] OHMAE, KENICHI: *End of Nation State: The Rise of Regional Economies*, 1996, HarperCollins, London, 80-89.
[25] HELD, DAVID: *Political Theory Today*, 1991, Stanford University Press, Stanford, California, 196-235.
[26] CSÁKI, GYÖRGY*: A nemzetközi gazdaságtan és a világgazdaságtan alapjai* [International Economics and the Fundamentals of the World Economy], 2011, Napvilág Kiadó, Budapest, 177.

the states but also developed codes of behavior and guiding mechanisms – in such important areas as finance and world trade.[27] At first, the slogan of "borderless trade" was mostly propagated by the USA: the ideal of "free trade" was officially embraced by the *Clinton* administration.[28] This free trade, i.e. the dissolution of obstacles imposed by the state upon the flow of trade relationships and assets was regarded as a significant step towards a unified worldwide economy. By and large, the ideological basis for this was the "Washington Consensus" which contained the goal of eliminating all barriers from foreign trade.[29] With the neoliberal-monetarist economic policy gaining momentum and with the intensifying of globalization, states were gradually losing influence over policies of commerce, which phenomenon manifested itself in the quickening of the liberalization process. While during the era of welfare states even the GATT operated as an organization more sensitive towards national interests,[30] with the demolition of the welfare state and "global free trade" becoming widespread and also the appearance of the WTO, this liberalization process really started to affect national policies of economy and trade, confining them within stifling borders.[31]

Of course, the borderless world has more than economic factors to contribute to sg. Signs of this are the mechanisms that increase border permeability (like the agreement of the European Council

[27] SIMAI, MIHÁLY: *A világgazdaság a XXI. század forgatagában. Új trendek és stratégiák* [The World Economy in the Turbulent 21st Century. New Trends and Strategies], 2007, Akadémiai Kiadó, Budapest, 50.

[28] BÍRÓ, GÁSPÁR: *Demokrácia és önrendelkezés a 21. század elején* [Democracy and Self-Determination at the Beginning of the 21st Century], 2003, Rejtjel Kiadó, Budapest, 75.

[29] SZIGETI, PÉTER: *Világrendszernézőben. Globális „szabad verseny" – a világkapitalizmus jelenlegi stádiuma* [Exploring World Systems. Global "open competition" – The Current Stage of World Capitalism], 2005, Napvilág Kiadó, Budapest, 133.

[30] CSÉFALVAY: *op. cit.*106-107.

[31] GEORGE, SUSAN: *A WTO. Korlátlan világkereskedelem vagy szolidáris globalizáció?* [The WTO. Untrammeled World Trade or Solid Globalization?], 2003, Napvilág Kiadó, Budapest, 9-10.

about making it easier for neighbouring regions to cooperate with each other), "open border" agreements (like Schengen), and connections reaching across borders (financial transactions and the world wide web).[32] We need to see that this phenomenon is two-faced, as most of the products of state legislations are still area-bound, extraterritorial laws are not very common. Thus, it is futile for the global economy to question the structure of territorially defined political units because its very existence depends upon them.[33]

5. NEOLIBERALISM AND THE ROLE OF THE STATE IN ECONOMIC POLICY

On the late 1970s emergence and later total dominance of the monetarist (neoconservative/neoliberal) orthodoxy had defeated the "welfare state project" which had been relatively successful for decades, Galbraith clearly stated that the monetarist offensive, both in the USA and in several Western European countries, was aimed against the post-WWII economic policy supported by a relatively wide societal consensus and underpinned by civil legitimacy.[34] These forces realized the ideology of *Friedrich August Hayek* and *Milton Friedman*, with their doctrinaire confidence based on the thesis of "cleansing the market": according to this principle, flexible prices enable the economy to stabilize itself[35] and the state has a function only in places where market integration is impossible. Belonging to this circle, one can find the so-called "empirical libertarians"[36] for whom individual freedom and market mechanisms have absolute

[32] BÍRÓ: *op. cit.* 76.
[33] CLARK: *op. cit.* 88.
[34] FORGÁCS: *op. cit.*88.
[35] BISHOP, JOHN D.: Adam Smith's Invisible Hand Argument, in *Journal of Business Ethics*, Vol. 14, No. 3. (1995), 165-180; PALLEY, THOMAS I.: Milton Friedman: The Great Laissez-faire Partisan, in *Economic & Political Weekly*, Vol. 41., No. 49. (2006), 5041-5043.
[36] BARR, NICHOLAS: *A jóléti állam gazdaságtana* [Economics of the Welfare State], Akadémiai Kiadó, Budapest, 2009, 92.

value, while – following *Hayek*'s teachings – striving for social justice is a superfluous and harmful effort. *Hayek* argues that if we fight for equality that will decrease, or even eliminate freedom.[37] According to his opinion, only the market is able to secure personal freedom and create economic profits. Believing in social justice and thus state intervention in economic policy, he admits, "necessarily a step closer to a totalitarian system."[38]

Friedman used even more concise language when he stated that "the influence of the state has to be curbed. Its main obligation should be to defend our freedom against both foreign, hostile powers, and our own fellow citizens: to protect law and order, to enforce private contracts, and to strengthen the competitive market."[39] These theories only differ from the ideal of the "night-watchman state" (which grants the state only negative functions)[40] in that they have allowed the state (as a last resort and in a very limited way) to execute some redistributive measures on certain public properties in order to ameliorate poverty.[41]

These statements were then taken to the extreme by the so-called New Right, which urged an obviously market-friendly, "anti-statist" policy. After the paradigm shift conducted by *Margaret Thatcher* (1979) and *Ronald Reagan* (1980), these demands also received governmental patronage from the dawn of the 1980s. It was at this time that an ideology became dominant that, within the framework of neoliberal policies of economy and development, proclaimed the primacy of market processes, drastic reduction of socioeconomic state intervention, and integration into an

[37] HAYEK, FRIEDRICH AUGUST: *Law, Legislation and Liberty, Vol. 2. The Mirage of Social Justice,* 1976, Routledge & Kegan Paul, London, 67.
[38] Ibid. 68.
[39] FRIEDMAN, MILTON: *Capitalism and Freedom*, 1962, University of Chicago Press, Chicago, 2-3.
[40] TAKÁCS, PÉTER (ed.): *Államelmélet I.* [The Theory of the State. Vol. 1.], 2009, Szent István Társulat, Budapest, 256.
[41] BARR: *op. cit*. 95.

international economy.[42]

The objectives of the Washington consensus (between the IMF, the World Bank and the American Department of Finance)[43] served as a theoretical basis for these processes (besides *Hayek* and *Friedman*). These prefer fiscal discipline, tighter budgets, reduction of tax benefits, financial liberalization, export-friendly currency exchange rates, demolition of obstacles in the way of international trade, easy entry of foreign operational capital, privatization, and total economic deregulation.[44]

Due to this directive or policy of "structural correction" enforced by global regulative powers – mainly the IMF and the World Bank –, nearly the whole planet has become a laboratory for the neoliberal "experiment" – after the collapse of the bipolar world order, even in the post-socialist areas, as well. "Everywhere, it has promoted the policy of liberalization, deregulation and privatization and the central role of market spontaneity as opposed to national regulation, and thus it has contributed greatly to the global economic openness of national economies, and also the widening and deepening of mutual interdependencies."[45] Thus, the neoliberal consensus means that they generally reject the *keynes*ian undertakings and want to achieve "rendering the state empty by putting more and more of its functions into private hands."[46]

Notwithstanding the abovementioned "mainstream" view, it is worth admitting that even within the neoliberal dogmas' sphere of influence, not everyone considers state intervention in the same way. Besides the very popular interpretative canon of the "retreating/suppressed state", another way of argumentation appeared which talks about the redesigning of state tasks and competences. Governments do not conform to the doctrine of the

[42] SCHEIRING, GÁBOR – BODA, ZSOLT: Lehet más a fejlődés [Development Can Be Different], in SCHEIRING – BODA: *op. cit.* 10.
[43] STIGLITZ: *op. cit.* 34.
[44] SZIGETI: *op. cit.* 133-134.
[45] SZENTES: *op. cit.* 70.
[46] CROUCH, COLIN: The terms of the neoliberal consensus, in *The Political Quarterly*, Vol. 86. No. 4. (1997), 357, 359.

smaller state, even though they do this in order to establish a business-friendly atmosphere and to attract foreign working capital. *Wacquant* convincingly argues that the institutional structure which enables the market to dominate is, after all, determined by the state. According to this insight, neoliberalism is not an economic project but a political one, which does not mean the deconstruction (or "dying off") of the state but its reorganization. Although, neoliberalism does reject collectivist economic policies (such as *Keynes*ian and Socialist practices) but also argues in favor of the "night watchman state". "Neoliberalism wants to reform and remodel the state, so that it will actively support and facilitate the ongoing political project of installing the markets."[47]

In addition to all this, in the scientific literature of recent years new concepts appeared which reject neoliberalism. The background to this was that people realized: "the Washington consensus is not a collection of global, politically and emotionally neutral laws, but a conglomerate of selfish interests clad in the appearance of scientific validity, which has crippled the nation's economy, increased poverty, and created an enormous burden of debts".[48] One stripe of this criticism called Governing the Markets, is led by *Robert Hunter Wade*[49] and is based on the notion that, taking the Southeast Asian model as an example, the outlines of a state can be drawn which firmly stays within the framework of capitalism and serves the purpose of long-term growth but still actively participates in economic life. *Wade* says that the existence of state-coordinated industrial policy and programs can contribute to the economic growth of developing countries, or even can be a necessity for them. The author also briefly has to mention another notion developed from *Wade*'s research results: the example of the Developmental State and the Neo-*keynes*ian economic paradigm, which are answers and challenges to monetarism.

[47] WACQUANT: *op. cit.* 20.
[48] RÓNA, PÉTER: Előszó [Prologue], in SCHEIRING – BODA: *op. cit.* 8.
[49] WADE, ROBERT HUNTER: *Governing the Markets. Economic Theory and the Role of Government in East Asian Industrialization*. 2003, Princeton University Press, New Jersey.

6. CONCLUSION

The tropes of globalization most often concern the marginalization of traditional nation state sovereignty. The author is quite certain about think that opposing neoliberal statements which have been treated as unquestionable dogmas for decades, there are new theories gaining ground which predict a new kind of role for the state. Based on these, a worldview can be constructed which unites the forces of the market, civil society, and the state, under the auspices of democratic pluralism and within the framework of a regulated market, by placing civil society first, state second, and market institutions third in an order of priority. Since the state can be even a catalyst of growth in the future if it concentrates its efforts on efficiency, keeps in mind the criteria of good government, gives priority to the values of democracy, constitutionality, and human rights, and retains its socially legitimized license to correct the failures of the market.

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Dávid PONGRÁCZ

Meinungsfreiheit vs. Würde der Gemeinden: Ein Einblick in das ungarische Recht

1. EINFÜHRUNG

Die Verteidigung der Würde der Gemeinden als eine potenziale Begrenzung der Meinungsfreiheit ist schon seit der Veränderung des politischen Systems ein regelmäßig zurückkehrender Tagesordnungspunkt in dem ungarischen politischen Leben und generierte zeitweise heftige Diskussionen. In den letzten 20 Jahren der Demokratie versuchte das Parlament mehrmals die der Gemeindeverteidigung dienenden straf- und zivilrechtlichen Mittel auszudehnen, aber bislang nur mit wenig Erfolg. Die Ursache der Erfolglosigkeit kann aus mehreren Aspekten beleuchtet werden. Der wichtigste ist, dass diese Bestrebungen immer auf die unverhält-nismäßige Begrenzung der Meinungsfreiheit hindeuten, und somit den rechtsstaatlichen Prinzipen nicht entsprechen.

Die Verteidigung der Gemeinde konsolidierte sich also auf einer Stufe, die auch in der Praxis ziemlich gut funktionierte. Heutzutage sind aber Wandlungen in diesem neuralgischen Themenkreis zu beobachten. Das ungarische Grundgesetz und dessen Modifizierungen, sowie das im letzten Jahr in Kraft getretene neue Strafgesetzbuch und das neue Bürgerliche Gesetzbuch wird diese Tendenz ändern. Das alles stellt Veränderungen von solchem Ausmaß dar, dass die Grenzen der Meinungsfreiheit zugunsten der Verteidigung der gemeindlichen Würde deutlich ausgeweitet werden können.

2. Das Recht auf Leben und auf Meschenwürde und die Meinungsfreiheit

Das Recht auf Leben und auf Menschenwürde, sowie das Recht auf freie Meinungsäußerung wurden schon im 18-19. Jahrhundert, in der ersten Welle des Menschenrechtes anerkannt. „Überhaupt von da an tauchte der Gedanke auf, dass diese zwei Grundrechte in Kollision stehen könnten, und dementsprechend in eine Rangfolge gebracht werden müssten, was den Kodifikatoren des Strafgesetzbuchs Kopfzerbrechen bereitete." In dieser Frage waren sich die ungarischen Rechtswissenschaftler schon vor dem Entwurf des sogenannten *Csemegi Kodex* (1878) einig: Die Menschenwürde als Grundlage der konstitutionellen Ordnung – sowohl auf der individuellen als auch auf der gemeindlichen Ebene – muss gegenüber dem Missbrauch der Meinungsfreiheit verteidigt werden.[1]

Die herausragende Bedeutung der Menschenwürde reicht in der ungarischen Auffassung also Jahrhunderte zurück. Heutzutage ist die Menschenwürde einem jeden Menschen, einfach aufgrund seines menschlichen Wesens gebührender, besonderer moralischer und rechtlicher Status, ein über das Recht stehender Wert, aufgrund dessen jeder Mensch verlangen kann in seinem Rang respektiert zu werden. Es handelt sich also um eine minimale Anerkennung, die garantiert, dass niemand als menschliches Wesen bestritten wird. Aus diesem Recht lassen sich auch weitere Grundrechte ableiten. Auf diese Art und Weise kann man das Recht auf Leben und auf Menschenwürde als Mutterrecht und die Herkunft des Selbstbestimmungsrechts nennen.[2] Die Wichtigkeit des Rechts auf Leben und auf Menschenwürde zeigt weiterhin, dass jene auf der Spitze des Grundrechtskatalogs eines jeden Staates stehenden, unteilbaren,

[1] Bárándy, Gergely: *A gyűlöletbeszéd Magyarországon* [Die Hassredein Ungarn], 2009, Scolar Kiadó, Budapest, 52.
[2] VerfGs-Urteil 23/1990. (X. 31.).

generellen menschliche Grundrechte sind.[3] Ungarn bildet keine Ausnahme, da dieses Recht den ersten Platz in der Hierarchie des ungarischen Verfassungsgerichtsgebrauchs belegt.

Der andere Schwerpunkt des Themas ist das Mutterrecht der Kommunikationsrechte, die Meinungsfreiheit. Die Gesellschaftskommunikation kommt durch die Kommunikationsrechte zustande, die die Teilnahme des Individuums an dem gesellschaftlichen und politischen Leben begründen. Gerade deswegen braucht man die freien Strömungen der Gedanken auf dem „Markt der Meinungen", so hält man diese Rechte berechtigterweise für die schätzenswertesten Freiheitsrechte der modernen Demokratien und Rechtsstaaten.[4] Ohne das Recht der freien Meinungsäußerung existierte keine demokratische Staatsordnung, deshalb wird die Meinungsfreiheit gleichermaßen wie das Recht auf Leben und auf Menschenwürde in allen internationalen rechtlichen Dokumenten als ein Grundrecht von enormer Wichtigkeit anerkannt. Alles in Betracht ziehend hat das Verfassungsgericht (*Alkotmánybíróság*, VerfG) sein eigenes Meinungsfreiheitsbild im Urteil 30/1992. (V. 26.) herausgearbeitet. Neben dem Entwurf des Prinzips der „Inhaltsneut-ralität" hat das Gericht das Recht der freien Meinungsäußerung als Mutterrecht bestimmt.[5]

3. FREIHEIT VS. WÜRDE

In dem öffentlichen Bewusstsein müssen diese beiden – in obenangeführter Weise – gegensätzlichen Grundrechte nebenein-

[3] HORVÁTH, DÓRA: Véleménynyilvánítás szabadsága kontra gyűlöletbeszéd [Meinungsfreiheit contra Hassrede], in *Studia Iuvenum Iurisperitorum*, Nr. 2. (2004), 41-70.

[4] SZÉKELY, LÁSZLÓ: *Magyar sajtó és médiajog* [Ungarisches Presse- und Medienrecht], 2007, Dialóg Campus Kiadó, Budapest-Pécs, 29.

[5] KOLTAY, ANDRÁS: A véleménynyilvánítás szabadsága. Fogalmi tisztázás az Alkotmány 61. §-hoz [Die Meinungsfreiheit. Begriffsklärung zu § 61. der Verfassung], in *Századvég*, Nr. 48. (2008), 77-104.

ander und einander ergänzend funktionieren. Wenn jemand die erwähnten Rechte missbraucht, und damit dem subjektiven Recht der Anderen schadet, soll die gesetzgebende Gewalt darauf reagieren.[6] Das Kuriosum dieses Themas resultiert eben daraus, dass das VerfG gemäß dem Recht auf Leben und auf Menschenwürde in der Hierarchie der Grundrechte just die Meinungsfreiheit auf den zweiten Platz rangierte. Beim Kollidieren dieser zwei Grundrechte Grundrechte ist es nicht überraschend, dass es besonders schwer ist, eine verfassungsmäßige Lösung zu finden. Sogar nach langem Kopfzerbrechen und der tiefgründigen Analyse des konkreten Falls ist es nicht einfach, zu solchen Fragen Stellung zu nehmen. Die Mannigfaltigkeit und die Pikanterie dieser nicht selten krassen Rechtsfälle begründen die Wichtigkeit der Erwägung und die sorgfältige Untersuchung der Umstände. Deswegen kann man nicht wirklich generelle Prinzipien ausgestalten, die Lehre der vorherigen Fälle kann nur eine helfende Hand reichen, um die neuen Probleme zu lösen.

Infolge der Position in der Rangfolge der Grundrechte hat die Meinungsfreiheit im Kampf gegen die Menschenwürde gute Chancen. Diese privilegierte Lage bedeutet nicht, dass die uneinschränkbar wäre, aber lediglich aufgrund ihres Inhalts darf noch keine Meinung eingeschränkt werden. Bei Meinungseinschränkungen muss immer irgendein erheblich zwingendes Recht oder Interesse vorliegen, der Inhalt und die Umstände der Äußerung gemeinsam rechtfertigen die Einschränkung. Anhand dieser Kriterien kann man mittels vier Werte die Grenzen der Meinungsfreiheit setzen. Auf der Spitze der zu verteidigenden Werte befinden sich die Interessen des Staates (verfassungsmäßige Ordnung, innere- und äußere Sicherheit, Verteidigung der Staatsgeheimnisse), denen folgen die Interessen der Gesellschaft (öffentliche Sittlichkeit, öffentliche Sicherheit, öffentliche Ruhe), *die Interessen der einzelnen gesellschaftlichen Gruppen* (Verteidigung gegen die rassische-, ethnische-, religiöse- und sexuelle Diskriminierung) und die Interessen des Individuums (Verteidigung des guten Ansehens,

[6] BÁRÁNDY: *op. cit.* 20.

der Ehre, den persönlichen Daten, der Privatsphäre).[7] Die Verteidigung schützt vor allem die Freiheit der Ansicht, der Kritik, der Beurteilung, einschließlich ihrer extremistischen Form, aber sie erstreckt sich nicht auf die Fälschung der Fakten.[8] Infolge dessen kann man nur gegen solche Äußerungen Retorsionen anwenden, die die Menschenwürde harsch beleidigen. Wenn die Frage der Einschränkung der Meinungsfreiheit auftaucht, kann man in der Regel nicht nur gegen sondern auch für die Einschränkung moralisch begründete Argumente stellen. Aus sittlichem Grund kann man also weder die enge noch die weite Interpretation der Meinungsfreiheit mit voller Überzeugungskraft unterstützen.[9]

Auf der Seite der Menschenwürde sieht das anders aus. Aus dem Verfassungsgerichtsgebrauch lässt sich folgern, dass die Menschenwürde eigentlich ein „Jolly Joker" in dem Kartenblatt der Menschenrechte ist, da sie als subsidiäres Grundrecht (und Mutterrecht) sowohl vom Verfassungsgericht als auch von allen anderen Gerichten jederzeit aufgerufen werden kann. Selbst wenn die Verfassungkein explizit erwähntes Grundrecht enthält, kann die Beleidigung eines Grundrechtes festgestellt werden.[10] Demzufolge wurde der Kreis der Fälle bezogen auf die Beleidigung der Menschenwürde noch mehr ausgedehnt, wodurch die Meinungsfreiheit eingeschränkt wird. Daneben muss man bedenken, dass die Menschenwürde nur im Zusammenhang mit dem Recht auf Leben und als Einheit mit ihr uneinschränkbar ist (z. B. Verbot der Todesstrafe, Abortusfrage, Euthanasie).Wenn sie sich davon löst, sind die einzelnen, aus ihr abzuleitenden Rechte einschränkbar.[11] Die

[7] HALMAI, GÁBOR: *A véleményszabadság határai* [Die Grenzen der Meinungsfreiheit], 1994, Atlantisz Könyvkiadó, Budapest, 276-277.
[8] VerfGs-Urteil 36/1994 (VI. 24.).
[9] KOLTAY, ANDRÁS: *A szabadság méltósága* [Die Würde der Freiheit], in *Századvég*, Nr. 49. (2008) 145-153.
[10] VerfGs-Urteil 8/1990 (IV. 23.).
[11] KOLTAY, ANDRÁS: Az emberi jogok, az emberi méltóság és az alkotmányos rend védelme a magyar médiaszabályozásban [Schutz der

Legitimation der Einschränkung hängt in jedem Fall im Wesentlichen von der verursachten oder verursachbaren Beleidigung ab, die durch den gegebenen Ort, Zeitpunkt und die Umstände bestimmt ist.

Im Lichte dieser Aspekte müssen die Gesetzgeber und die Rechtsanwender sorgfältige Erwägungen anstellen, sofern in einem konkreten Fall die Beleidigung der Würde der Gemeinden auftaucht. Das Recht ist also – gerade zwecks der Behütung der Freiheit und der Menschenwürde – zu einem ewigen Ausbalancieren der gegenüberstehenden Interessen gezwungen.

4. WÜRDE DER EINZELNE UND WÜRDE DER GEMEINDEN?

Bevor ich das Thema weiterführe, muss ich noch eine andere wichtige Frage klären: Was versteht man unter Würde der Gemeinden? Die Würde des Einzelnen und die Würde der Gemeinden sind schwer mit Rechtsbegriffen zu definieren. Das VerfG konnte diese Definitionen auch nicht ausarbeiten, obwohl es zahlreiche Kennzeichen und Funktionen bestimmt hat. In der ungarischen Rechtsordnung benutzen des Weiteren lediglich einige Verfassungsgerichtsurteile den Ausdruck „Würde der Gemeinde". Damit hat das VerfG ihre Existenz anerkannt, und betrachtet sie als zu schützenden Wert.[12]

Es ist auch wichtig zu erwähnen, dass IstvánKukorelli das Recht der Gemeinden auf Menschenwürde nicht anerkennt. Nach seiner Sondermeinung bezüglich des VerfG-Urteils 14/2000. (V. 12.) kann die Würde nur an Einzelne gebunden sein, so kann nicht von Verteidigung der Gemeinden die Rede sein, da die Würde

Menschenrechte, der Menschenwürde und des Verfassungsrechts in der ungarischen Medienregelung], in *In Medias Res,* Nr. 1. (2012), 37-66.

[12] KOLTAY, ANDRÁS: *A közösségek méltóságának védelme* [Die Verteidigung der Würde der Gemeinden], in *Iustum Aequum Salutare,* Nr. 1. (2005) 147-169.

ausschließlich an Einzelne gebunden ist.[13] Der Gesetzgeber bezieht sich jedoch auf etwas Anderes. Die Würde der Einzelnen der Gemeinde die miteinander straff verbunden sind, hat einen solchen Ausdruck, der nur und ausschließlich dadurch existiert, dass die gegebene Person zur gegebenen Gemeinde gehört. Das heißt, die persönliche Würde des Gemeindemitgliedes existiert durch die Zugehörigkeit zur gegebenen Gemeinde, und deren Eigenschaft ist ebenso verteidigungswürdig.

Die Gemeinde als Entität kann man als eine solche Personengesamtheit definieren, deren Mitglieder zusammengehören, die sich aber anders fühlen als andere Menschen. Die Gemeindemitglieder halten das Bewusstsein der Verinnerlichung und Differenzierung zusammen, außerdem verfügen sie über innere Normen und Werteordnung, die sie durchsetzen und zur Geltung bringen können. Die Gemeindemitgliedschaft ist manchmal ein individueller Entschluss (Religion), aber Charaktergebende Merkmale sind oft von Geburt an bestimmend (nationale-, ethnische Zugehörigkeit, sexuelle Orientierung).[14]

„Eine weitere Frage ist die Relevanz der Größe der Gemeinde, da man sagt: Je größer die Gemeinde, desto schwächer die zusammenhaltende Kraft. Das hängt aber nicht unbedingt von der Größe ab. Eine Familie als Gemeinde bleibt nicht immer zusammen, während sich in einer Kirchengemeinde auch unter Fremden Bindungen erkennen lassen.“[15]

Zusammenfassend lässt sich feststellen, dass der Grund der Gemeindemitgliedschaft eine solche Eigenschaft sein muss, die ein markanter Charakterzug der Persönlichkeit des Menschen ist, der per

[13] VerfGs-Urteil 14/2000 (V. 12.): Die Sondermeinung von István Kukorelli.
[14] BÁRÁNDY: *op. cit.* 28-29.
[15] KOLTAY, ANDRÁS: *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban* [Die Grundzüge der Meinungsfreiheit – im ungarischen, englischen, amerikanischen und europäischen Vergleich], 2009, Századvég Kiadó, Budapest, 549.

se verteidigungswürdig ist, wodurch eigentlich auch die Verteidigung der Gemeinde begründet ist.

5. DIE RECHTSVERTEIDIGUNG DER WÜRDE DER GEMEINDEN

5.1. Die Gemeinden in dem Grundgesetz

Die in Ungarn laufenden, die Menschenrechte, d. h. unter anderem die Rechte der Gemeinden betreffenden Änderungen haben die im ersten Januar 2012 in Kraft getretene neue Verfassung, das Grundgesetz *(Alaptörvény)* eingeleitet, das schon seine fünfte Änderung durchlief. Gleichermaßen wie im deutschen Grundgesetz ist im ungarischen Grundgesetz die Menschenwürde dominant. Im eingefassten „Nationales Glaubensbekenntnis" *(Nemzeti Hitvallás)* benennt die Menschenwürde den Grund des menschlichen Wesens. Entsprechend Artikel II. des Kapitels „Freiheit und Verantwortung" wird die Unverletzlichkeit der Menschenwürde deklariert, die jedem Menschen gebührt, sogar als Nummer eins in der Liste der Grundrechte.

Die die Meinungsfreiheit angehenden konstitutionellen sowie gesetzlichen Bestimmungen haben sich am stärksten geändert.[16] Artikel IX. Absatz (1) deklariert das Recht auf freie Meinungsäußerung, Absatz (2) „anerkennt die Freiheit und Vielfarbigkeit der Presse und schützt sie, außerdem garantiert er die Bedingungen der freien Auskunft, die für die öffentliche Meinungsbildung in der Demokratie erforderlich ist."

Als „Neuigkeit" erscheint die Meinungsäußerungsschranke gemäß Absatz (4): „Die Ausübung der Meinungsfreiheit darf nicht mit der Beleidigung der Menschenwürde einhergehen." Der Schutz der Menschenwürde war natürlich ohnehin anerkannt, aber diese Schranke erscheint schon explizit in dem Text des Grundgesetzes.

[16] SMUK, PÉTER: *Ostrom vagy felújítás alatt? A véleményszabadság új határai* [Offensive oder Reform? Die neuen Grenzen der Meinungsfreiheit], in *Közjogi Szemle*, Nr. 2. (2013) 25-34.

Gemäß der Begründung der vierten Änderung ist das notwendig, damit verfassungsmäßige Grundlagen geschaffen werden können, bei Verletzung der Würde der Gemeinden gegen Hassrede mit zivilrechtlichen Sanktionen vorgehen zu können.

Aus dieser Annäherung ist der sich ausgesprochen auf die Verteidigung der Gemeinden richtende Absatz (5) zu verstehen: „Die Ausübung der Meinungsfreiheit darf nicht mit der Beleidigung der Würde der ungarischen Nation, der nationalen-, ethnischen-, rassischen- oder religiösen Gemeinden einhergehen. Diese Gemeindemitglieder sind – im gesetzlichen Rahmen – berechtigt, gegen solche Gemeinde beleidigenden Meinungsäußerungen ihre Anrechte vor Gericht durchzusetzen." Der vorherige Verfassungsgerichtsgebrauch hat nämlich klar gemacht, dass auf gesetzlicher Ebene nicht für das wirksame Auftreten zugunsten der Ausdehnung der Verteidigung der Gemeinden garantiert werden kann.[17] Deswegen wünscht der Gesetzgeber – wie das Beispiel zeigt – diese Verteidigung mit der Änderung des Grundgesetzes zu legitimieren.

Die konstitutionelle Grundstellung lässt sich also wie folgt formulieren: Die Menschenwürde und die Meinungsfreiheit genießen eine erhöhte Position im System der Grundrechte, aber in einigen Fällen müssen sie sich vor der Menschenwürde neigen. Weiterhin taucht die Frage auf, ob Absatz (4) des Artikels IX. als Neuerung bewertet werden kann, da nach der wortwörtlichen Interpretation dieses Absatzes die Menschenwürde in jedem Fall über die Meinungsfreiheit stehen sollte, deren Einschränkung überhaupt nicht in Frage kommen dürfte. In der ungarischen Auffassung ist das aber nicht die eigentliche Bestrebung, sondern die Verteidigung der Würde der Gemeinden.[18]

5.2. Strafrechtliche Aspekte

Die seit 2010 laufenden öffentlich-rechtlichen Änderungen haben selbst den Bereich des Strafrechts nicht unberührt gelassen. Das neue

[17] Gesetzesvorlage T/9929 über die vierteÄnderung des Grundgesetzes von Ungarn. AusführlicheBegründung.
[18] SMUK: *op. cit.* 25-34.

Strafgesetzbuch (*Büntető Törvénykönyv*, StGB) ist am ersten Juli 2013 in Kraft getreten, und mischte die der Gemeindenverteidigung dienenden Satzungen auf.

Die unten geschilderten Straftatbestände bedeuten ohne Ausnahme die strafrechtlichen Einschränkungen der Meinungsfreiheit um die Verteidigung der Menschenwürde der Gemeinden. Fast alle dieser Straftatbestände befinden sich im Kapitel der Straftaten gegen die öffentliche Ruhe, und zwar nicht zufällig, da durch das geschützte Rechtsobjekt in jedem Fall die Erhaltung der öffentlichen Ruhe, das Interesse der Wahrung des gesellschaftlichen Friedens ist, neben dem die Respektierung der Würde der Gemeinden erscheint.

5.2.1. Die Hassrede

Die häufigste Form der Beleidigung der Würde der Gemeinde ist die Hassrede. Laut GáborHalmai „gehören zu dieser Abteilung der Kommunikation solche Reden, durch die der Redner – meistens von Vorurteilen oder gerade von Hass geleitet – über rassische, ethnische, religiöse oder sexuelle Gemeinden oder über deren einzelne Mitglieder im Zusammenhang mit ihrer Gemeindemitgliedschaft solche Meinungen ausdrückt, die Hass gegen die Gemeindemitglieder wecken können.“[19] Ergänzend kann man ein weiteres Begriffselement benennen, und zwar die Furcht einflößende Fähigkeit der Rede.[20]

Die umfassende ungarische Rechtsordnung betrachtend man hat den Eindruck, dass der Hass „selten wie ein weißer Rabe“ in der Welt des ungarischen Rechts ist.[21] Der Ausdruck „Hassrede“ taucht

[19] HALMAI, GÁBOR: *Kommunikációs jogok* [Kommunikationsrechte], 2002, Új Mandátum Könyvkiadó, Budapest, 114.
[20] KOLTAY: *op. cit.* (2009) 509.
[21] FÖLDESI, TAMÁS: *A gyűlölet és a büntetőjog (A Janus arcú gyűlöletbeszéd)* [Der Hass und das Strafrecht (Die Hassrede mit dem Janusgesicht)], in LACZKÓ SÁNDOR – DÉKÁNY ANDRÁS (Hg.): *Lábjegyzetek Platónhoz - A gyűlölet* [Fußnoten zu Platon - Der Hass], 2008, Pro

nicht in der ungarischen Rechtsordnung auf, darunter versteht man vor allem – gleichermaßen wie im deutschen Recht – die Straftat der Volksverhetzung. Der Text der StGB lautet wie folgt: „Wer vor großer Öffentlichkeit a) gegen das ungarische Volk, b) gegen irgendeine nationale, ethnische, rassische, religiöse Gruppe, oder c) gegen die einzelnen Gruppen der Bevölkerung – besonders hinsichtlich auf Behinderung, sexuelle Identität, sexuelle Orientierung – zum Hass aufstachelt, wird wegen Straftat mit Freiheitsstrafe bis zu drei Jahren bestraft.“[22] Die einzige Änderung ist die Benennung der Behinderung, der sexuellen Identität, der sexuellen Orientierung als gruppenbildenden Aspekt. Diese Gruppen waren aber ohnehin schon geschützt, deren Erwähnung ist lediglich als Gestus gegenüber den Betroffenen zu werten.

An dieser Stelle muss kurz die Auffassung des VerfGs bezüglich der Hassrede erwähnt werden, da die Gesetzgeber schon mehrmals versucht hat den Begriff dieser Straftat im Namen der Verteidigung der Gemeinden auszudehnen. Das VerfG „spielte“ in vier prinzipiell signifikanten Urteilen „herunter“, was bei der Pönalisierung welcher Täterverhalten als verfassungswidrig gilt. So befand das VerfG die Bestrafung folgender Täterverhalten für verfassungswidrig: *Nutzung beleidigender und erniedrigender Expressionen; Verübung zu Anstiftung von sonstigen Hass geeigneter Taten; Anstiftung zum Hass oder Aufforderung zu Gewaltmaßnahmen; Nutzung und Verbreitung von Ausdrücken in großer Öffentlichkeit bzw. Körperbewegungen, die an eine Willkürherrschaft oder eine Idee einer Willkürherrschaft erinnern oder sie andeuten, die geeignet sind die Gemeinde in ihrer Ehre zu kränken.* Die Begründung der Nichtigerklärung dieser Täterverhalten war hauptsächlich, dass sie keine offenbare und anwesende Gefahr *(„clear and present danger“)* darstellen, das heißt, den gesellschaftlichen Frieden nur abstrakt gefährden und deren

Philosophia Szegediensi Alapítvány - Magyar Filozófiai Társaság, Szeged, 262-272.

[22] Gesetz Nr. C. 2012 über das Strafgesetzbuch. § 332. *Közösség elleni uszítás.*

Pönalisierung die Meinungsfreiheit disproportional einschränkten. Außerdem waren manche zu abstrakt definiert oder senkten die konstitutionell anerkannte *Strafbarkeitsschwelle*.[23]

Zusammenfassend lässt sich feststellen, dass die Pönalisierung der Hassrede sich in Ungarn auf einer festen Ebene stabilisierte, die alle lockernden Versuche des Gesetzgebers überstand. Sogar das neue StGB ließ diesen Straftatbestand unberührt, obwohl András Sajó ist der Meinung, dass nach dem Gebrauch des Europäischen Gerichtshofs für Menschenrechte manche der erwähnten Täterverhaltene verteidigungsunwürdig sind.[24]

5.2.2. Leugnung der Sünden der nationalsozialistischen und kommunistischen Regime

Die öffentliche Leugnung der Sünden der nationalsozialistischen und kommunistischen Regime – genauso wie im deutschen Recht – gehörten zu dem Straftatbestand der Volksverhetzung, aber in dem neuen StGB wurde diese Straftat getrennt geregelt, die lautet folgendermaßen: „Wer vor großer Öffentlichkeit den von nationalsozialistischen oder kommunistischen Regimen begangenen Völkermord oder andere Maßnahmen gegen die Menschlichkeit leugnet, in Zweifel zieht, verharmlost, oder billigt, wird wegen Straftat mit Freiheitsstrafe bis zu drei Jahren bestraft.“[25]

Der erst vor ein paar Jahren eingeleitete Straftatbestand hat bereits der Probe des VerfGs standgehalten. Auf der Änderung der kurzlebigen Holocaustleugnung „war die Tinte kaum getrocknet“, als am 4. August 2010 Béla Biszku, ehemaliger hochrangiger Politiker der Ungarischen Sozialistischen Arbeiterpartei- *(Magyar Szocialista Munkáspárt, MSZMP)* in der Fernsehsendung „Öffentliche Rede“ *(Közbeszéd)* des Kanals *Duna*den ungarischen Volksaufstand 1956

[23] VerfGs-Urteile 30/1992. (V. 26.) 12/1999 (V. 21.), 18/2004 (V. 25.) und 95/2008 (VII. 3.).

[24] SAJÓ, ANDRÁS: A faji gyűlölet igazolása büntetendő [Die Rechtfertigung des Rassismus ist zu bestrafen], in *Fundamentum,* Nr. 4. (2004), 21-34.

[25] Gesetz Nr. C. 2012 über das Strafgesetzbuch. § 333. *A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása.*

als Gegenrevolution, nationale Tragik bezeichnete und behauptete, dass die nach der Revolution angefangenen Prozesse keine Schauprozesse seien und wegen begangener Taten begonnen hätten. Die Staatsanwaltschaft der Budapester Bezirke I. und XII. hat Biszku wegen öffentlicher Leugnung der Sünden der nationalsozialistischen und kommunistischen Regime angeklagt. Laut der Anklageschrift hat Biszku die Sünden der kommunistischen Regime in der oben erwähnten Sendung vor großer Öffentlichkeit verharmlost.[26]

Aber im Februar 2011 hat der Richter des Biszku-Prozesses den Prozess ausgesetzt, da er den anzuwendenden Straftatbestand für verfassungswidrig hielt und sich für deren Verfassungskontrolle einsetzte. Laut des VerfGs-Urteils ist „die Leugnung der Sünden des Nationalsozialismus und Kommunismus ein Missbrauch der Meinungsfreiheit, die nicht nur die Würde der Gemeinden der Opfer tief verletzt, sondern auch die für sie Solidarität zeigenden und sich für demokratische Werte engagierenden Staatsbürger." Um dieses Engagement aufrechtzuerhalten, braucht man andererseits ein wirksames Auftreten gegen demokratische Ideen in Frage stellende Äußerungen. Drittens können diese Straftaten die öffentliche Ruhe stören, die der Straftatbestand schützt. Alle dieser konstitutionellen Werte beachtet ist diese strafrechtliche Einschränkung der Meinungsfreiheit verfassungsmäßig.[27]

5.2.3. Verwendung der Symbolen der Willkürherrschaften

Im ungarischen Recht ist die Verwendung willkürherrschaftlicher Symbole auch per se strafbar. Das vorherige StGB hat die bloße Verwendung von solchen Symbolen strafbar gemacht. Nur die Verwendung populärwissenschaftlicher, wissenschaftlicher, künstlerischer und bildungsrelevanter Ziele bildete Ausnahme.[28] Das VerfG rechtfertigte diese Strenge vor allem mit der besonderen historischen Situation Ungarns, und mit der Notwendigkeit der Festigung der

[26] http://www.mabie.hu/node/618 [cit. 2013-10-26].
[27] VerfGs-Urteil 16/2013. (VI. 20.).
[28] Gesetz Nr. IV. 1978. über das Strafgesetzbuch. § 269/B. *Önkényuralmi jelképek használata.*

Demokratie. Daneben löst die Verwendung dieser Symbole Bedrohungsgefühl und auf konkreten Erfahrungen basierende Angst aus.[29] Jedoch war der Straftatbestand problematisch, da dadurch die harmlosen, für die Störung des öffentlichen Friedens nicht geeigneten Verhalten auch strafbar waren, und analog zu den „Verhetzungsurteilen" verfassungswidrig.[30]

Dieses „stille Gewässer" schien der Fall eines Politikers, Attila Vajnai aufzumischen, der bis nach Straßburg gelang. Vajnai hat den roten Stern auf einer legalen politischen Veranstaltung getragen. Er wurde wegen Verwendung eines willkürherrschaftlicher Symbols verurteilt, aber der Europäische Gerichtshof für Menschenrechte hat Ungarn kondemniert, da Vajnai den roten Stern trug, der seit Jahrhunderten als Symbol der Arbeiterbewegung galt. Außerdem stellte das Gericht fest, dass dieses Verbot angesichts der vielfältigen Bedeutung des roten Sterns zu weitverbreitet ist.[31]

Trotz des Falles blieb der fragliche Straftatbestand unberührt, aber 2012 unterzog ihn Vajnai selbst einer Verfassungskontrolle in Bezug auf die disproportionale Einschränkung der Meinungsfreiheit und auf sein erwähntes Straßburger Urteil. Anhand des Urteils revidierte das VerfG seinen früheren Standpunk und stellte die Verfassungswidrigkeit des Straftatbestandes fest. Laut der Entscheidung des VerfGs dürften die Symbole der Willkürherrschaften durchaus verboten werden, da diese die Menschenwürde verletzen können, und im Gegensatz zur Werteordnung des Grundgesetzes stehen. Das Verbot in dem StGB ist aber zu weitläufig, „da es nicht differenziert, sondern anordnet, die Verwendung der Symbole im Allgemeinem zu bestrafen." Man müsste den Nutzungszweck der Symbole, die Weise der Verübung und deren Wirkung beachten. Sonst gelten solche Verhalten als bestrafbar, deren Pönalisierung die Meinungsfreiheit disproportional einschränkt.[32]

[29] VerfGs-Urteil 14/2000. (V. 12.).
[30] István Kukorelli meinte in diesem Fall sollte man auch den *„clear and presentdanger"*- Maßstab anwenden.
[31] http://www.jogiforum.hu/hirek/18357 [cit. 2013-10-27].
[32] VerfGs-Urteil 4/2013 (II. 21.).

Im Sinne des obigen Urteils wurde der in dem neuen StGB mit ungeändertem Text eingegebenen Straftatbestand vor seinem Inkrafttreten annulliert. Der neue Text lautet also wie folgt: „Wer ein Hakenkreuz, ein SS-Zeichen, ein Schützenkreuz, einen Hammer und eine Sichel, einen fünf zackigen roten Stern oder diesen darstellende Symbole in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören – besonders die Würde der Gemeinden der Opfer oder deren Gnadenrecht zu verletzen – a) verbreitet, b) vor großer Öffentlichkeit verwendet, oder c) öffentlich ausstellt, sofern keine schwerere Straftat erfüllt ist, wird wegen Vergehen mit Freiheitsentzug bestraft.“[33] Diese Formulierung impliziert die vorherigen rechtfertigenden Umstände und definiert die Vollführungs-bedingungen des Deliktserfolgs.

5.2.4. Verunglimpfung der Staatssymbole

Die Verunglimpfung der Staatssymbole ist ein weiterer, auch im deutschen Recht bekannter Straftatbestand, der die strafrechtliche Verteidigung der Staatssymbole sichert. Bei Hoheitsabzeichen und Staatssymbole betreffenden Delikten werden europaweit ähnliche wie die ungarischen Sanktionen angedroht, nichtsdestotrotz meinte IstvánKukorelli, dass der Text des vorherigen StGBs gewissermaßen problematisch war. Ihm zufolge sollte das VerfG in seinem sich mit diesem Straftatbestand befassenden Urteil die Vorrangigkeit der Meinungsfreiheit, der Freiheit der Wissenschaft und der Kunst deklarieren, da die Staatssymbole betreffenden negativen Äußerungen, wissenschaftliche Kritiken, verblüffende Darstellungen die Gesellschaft nicht per se gefährden.[34]

Aber Kukorellis Ansicht scheint sich im neuen StGB zu zeigen, da statt der Formulierung *„andere solche Taten begehen“* die Wendung *„auf andere Weise verunglimpft“* benutzt wird. Die derzeit geltende Satzung lautet also folgendermaßen: „Wer vor großer

[33] Gesetz Nr. C. 2012. über das Strafgesetzbuch. § 335. *Önkényuralmi jelkép használata.*

[34] VerfGs-Urteil 13/2000 (V. 12.). Parallele Begründung von István Kukorelli.

Öffentlichkeit die Hymne, die Flagge, das Wappen von Ungarn oder die Heilige Krone beleidigende oder erniedrigende Ausdrücke nutzt, bzw. sie auf andere Weise verunglimpft, sofern keine schwerere Straftat erfüllt ist, wird wegen Vergehen mit Freiheitsstrafe bis zu einem Jahr bestraft."[35] Die Verunglimpfung schließt die negative Meinung oder Darstellung und die Kritik offenbar nicht mit ein, so lässt sich der Kreis der Striktion des Täterverhaltens feststellen. Daneben wurde der Kreis der zu verteidigenden Staatssymbole der Werteordnung des Grundgesetzes entsprechend mit der Heiligen Krone ergänzt.

5.2.5. Sonstige Delikte gegen die Menschenwürde

Der Vollständigkeit halber muss man kurz die Straftatbestände erwähnen, deren geschütztes Rechtsobjekt das gesellschaftliche Interesse an der Verteidigung der Menschenwürde ist, da deren Anwendungsbereich im Sinne von Absatz (5) des Artikels IX. des Grundgesetzes auf die Würde der Gemeinden ausdehnbar wäre. Dies bedeutet, dass es konzeptionell möglich ist, Verleumdung, Beleidigung und Verunglimpfung des Andenkens der Verstorbenen[36] gegen eine ganze Gemeinde zu begehen. Obwohl die aufgeführten Delikte im Sinne von § 231 nur auf Strafantrag strafbar sind, anerkennt der ominöse Artikel des Grundgesetzes das Recht der Gemeinden, wegen Beleidigung ihrer Menschenwürde ihre Anrechte vor Gericht durchsetzen zu können.

Das bedeutet quasi freien Spielraum für die Rechtsanwender, um mildere – einst als verfassungswidrig bezeichnete – Formen der Hassrede zu sanktionieren. Eine solche Verschiebung des Gerichtsgebrauchs könnte auch zur disproportionalen Einschränkung der Meinungsfreiheit führen.

[35] Gesetz Nr. C. 2012 über das Strafgesetzbuch. § 334. *Nemzeti jelkép megsértése.*
[36] Gesetz Nr. C. 2012 über das Strafgesetzbuch. § 226-228. *Rágalmazás, Becsületsértés, Kegyeletsértés.*

5.3. Zivilrechtliche Aspekte

Die intensive Tätigkeit des Gesetzgebers der letzten Jahre hat sich dem Bereich des Zivilrechts auch nicht entzogen. Am 15. März 2014 wird das neue Bürgerliche Gesetzbuch (*Polgári Törvénykönyv*, BGB) in Kraft treten, das bemerkenswerte Änderungen in Bezug auf die Verteidigung der Persönlichkeitsrechte der Gemeinden enthält. Das Parlament hat die Verfassungsmäßigkeit des Gesetzes – wie bereits darauf hingewiesen – nachträglich durch die Änderung des Grundgesetzes gesichert.[37]

Das noch geltende BGB § 75 schützt im Allgemeinen die in dem § 76 mit offener Taxation aufgeführten Persönlichkeitsrechte. Im Falle ihrer Beleidigung kann die verletzte Partei aufgrund des BGBs § 84 Rechtsschutz für sich beanspruchen. Obwohl die Beleidigungen mit der Zugehörigkeit zu einer Gruppe korrelieren, stehen sie nicht unter direktem Verbot, aber das lässt sich aus der sonst geschützten Menschenwürde ableiten. Falls ein Gemeindemitglied in Bezug darauf einen Prozess anstrengt, kann sich der Täter einfach mit der Erklärung rechtfertigen, mit seinem Verhalten die gegenüberstehende Partei nicht absichtlich beleidigt zu haben.

Demgegenüber deklariert das neue BGB auch den generellen Schutz der Persönlichkeitsrechte, die aber schon ausgesprochenermaßen aus der Menschenwürde abgeleitet sind.[38] Der § 2:45 bestimmt den zivilrechtlichen Begriff der Beleidigung und der Verletzung des guten Ansehens und der § 2:50 regelt das Gnadenrecht. Die Gemeinden betreffende wichtigste Änderung ist jedoch Absatz (5) des § 2:54: „Jedes beliebige Mitglied der Gemeinde ist berechtigt im Falle einer wegen seiner Zugehörigkeit zur ungarischen Nation, bzw. zu irgendeiner nationalen, ethnischen,

[37] 2007 hat das Parlament schon versucht die zivilrechtliche Verteitigung der Gemeinden zubegründen, aberdas VerfG hat diese Gesetzvorlage annulliert [VerfGs-Urteil 95/2008 (VII. 3)]. Die Lehre aus diesem Urteilziehend hat das Parlament die neuen Satzungen begründet und formuliert.

[38] Gesetz Nr. V. 2013 über das Bürgerliche Gesetzbuch. § 2:42. *A személyiségi jogok általános védelme.*

rassischen oder religiösen Gemeinde, die als markanter Charakterzug seiner Persönlichkeit gilt, die Gemeinde vor großer Öffentlichkeit schwer beleidigende oder in der Ausdrucksweise ungerechtfertigt kränkende Rechtsverletzung innerhalb einer ab der Rechtsverletzung gerechneten Ausschlussfrist von dreißig Tagen sein Persönlichkeitsrecht geltend zu machen. Jedes beliebige Mitglied der Gemeinde kann mit Ausnahme der Überlassung des durch Rechtsverletzung erreichten Vermögensvorteils jede Sanktion der Verletzung der Persönlichkeitsrechte geltend machen."

Im neuen BGB wird also die Konstruktion der den Einzelnen „überstrahlenden" Beleidigung anerkannt. Die zugehörigen Sanktionen (§ 2:51-53) orientieren sich an der vorherigen Regelung, so lässt sich weiterhin über von Zurechnungsfähigkeit unabhängigen Sanktionen und über Haftpflicht reden. Neben diesen erscheint das Bußgeld für Beleidigungen als eine wesentliche Neuerung, die im Falle der immateriellen Beleidigungen vonnöten ist. Weiterhin im Sinne von Absatz (4) ist der Staatsanwalt berechtigt ohne Autorisierung durch den Beleidigten Klage zu erheben, falls die Verletzung des Persönlichkeitsrechts auf das öffentliche Interesse prallt.

6. ZUSAMMENFASSUNG

Es konnte gezeigt werden, dass diese Bestrebungen des Gesetzgebers trotz der erfolgslosen Bemühungen und der annullierten Gesetzvorlagen um die Verstärkung der Verteidigung der Würde der Gemeinden nicht abgebrochen wurden. Es zeigt, dass die Regelung der Verteidigung der Gemeinden in den letzten Jahren bemerkenswert aufgewirbelt wurde. Aber diesmal wurde das Grundgesetz – vorsorglich – zwecks der Neutralisierung des Verfassungsgerichtsgebrauchs geändert. Diese Zwecke scheinen die Abrogation der vor dem Inkraftreten des Grundgesetzes getroffenen Entscheidungen des VerfGs durch die vierte Änderung zu vollziehen.

Die Verwirklichung dieser Bestrebungen und an dieser orientierende „Feinabstimmung" des Grundgesetzes dürfen aber nicht ausreichen, um sie in ihrer derzeitigen Form dauerhaft zu

befestigen. Die früheren Urteile des VerfGs schützten nämlich die fürsorglich gezeichneten konstitutionellen Grenzen der Meinungsfreiheit, deren Nichtberücksichtigung in bestimmten Fällen zur Disproportionalität der seit Neuestem anwendbaren strafrechtlichen und zivilrechtlichen Sanktionen führt.

Zuerst lässt sich feststellen, dass die Leugnung der Sünden der nationalsozialistischen und kommunistischen Regime nicht befriedigend geregelt wurde. Wie das VerfGs-Urteil 16/2013 (VI. 20.) – ganz richtig – erklärte, schützt die Satzung auch die öffentliche Ruhe, und die in ihr implizierten Verhalten können zur Erregung öffentlichen Ärgernisses prädestiniert sein. Aber dieses Kriterium befindet sich nicht in dem Straftatbestand. Außerdem soll der Gerichtsgebrauch bezüglich der Verleumdung, der Beleidigung und der Verunglimpfung des Andenkens der Verstorbenen auftauchenden Problemen klar reagieren, und zwar mit der Nichtanerkennung des Prinzips der „überstrahlenden" Beleidigung aus dem Bereich des Strafrechts. Außerdem ist es erwähnenswert, dass davon unabhängig auch die Einzelnen im Zusammenhang mit ihrer Zugehörigkeit zu einer Gruppe mit dazu geeigneten Äußerungen in ihrer Ehre gekränkt oder beleidigt werden können.

Die neue Satzung des BGBs hat auch ihre Fehler. Das Rechtfertigungsverbot fehlt unveränderlich aus dem Gesetzestext, so bleibt der Zweck von Absatz (5) des § 2:54 unerfüllt. Ein weiterer bemerkenswerter Fehler, der zur neuen Regelung gehört, ist, dass der Begriff der Gemeinde zwar breitgefächert ist – die ungarische Nation, die auf die Anerkennung der Rechte der Gemeinden in Mehrheit hinweisen könnte, benennt –, aber sie ist nicht exakt genug definiert und nicht alle Gruppen der Bevölkerung werden bedacht. Das brennendste Problem ist aber, dass die Möglichkeit der parallelen Klageerhebungen nicht ausgeschlossen wird,[39] es wird lediglich versucht mit einer Ausschlussfrist von dreißig Tagen die Zahl solcher Klagen zu reduzieren. Schließlich verletzt der Absatz (4) das Selbstbestimmungsrecht des Einzelnen.

[39] Allerdings scheint die letzte Änderung der Zivilprozessordnung dieses Problem zulösen.

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[6] VerfGs-Urteil 13/2000 (V. 12.).
[7] VerfGs-Urteil 14/2000 (V. 12.).
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Tamás SZENTGYÖRGYVÁRI

Anfangszeiten der Selbständigen Gesetzlichen Regelung Bezüglich der Wohnlage der Ausländer in Ungarn

1. MIGRATIONSPROZESSE AN DER JAHRHUNDERTWENDE

1.1. Nötigkeit der Regelung der Einwanderung

Die Regelung der Einwanderungsfrage und die Schaffung unseres ersten selbständigen Fremdenpolizeigesetzes können mit dem Ministerpräsidium von Kálmán Széll verbunden werden. Die Regierung wollte 1903 durch die Unterbreitung eines umfassenden Gesetzpaketes die Regelung der anscheinend immer größer werdenden Einwanderung lösen. Das Parlament hat den Gesetzantrag[1] über die Wohnmöglichkeit der Ausländer in den Ländern der ungarischen Krone mit den Anträgen über die Grenzpolizei,[2] die Auswanderung[3] und die Reisepassfrage[4]

[1] 1903. évi V. törvénycikk a külföldieknek a magyar korona országai területén való lakhatásról [Gesetzartikel V/1903 über die Wohnlage der Ausländer in den Ländern der ungarischen Krone], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=6873 [cit. 2013-09-07]. Es wurde am 11. März 1903 sanktioniert. Es wurde am 14. März 1903 im „Landesgesetzblatt" veröffentlicht.

[2] 1903. évi VIII. törvénycikk a határrendőrségről [Gesetzartikel VIII/1903 über die Grenzpolizei], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=6876 [cit. 2013-08-07].

[3] 1903. évi IV. törvénycikk. a kivándorlásról [Gesetzartikel IV/1903 über die Auswanderung], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=68762 [cit. 2013-08-07].

zusammen behandelt. Welche Gründe konnten im Hintergrund dieser Gesetzgebungsarbeit stehen, welche Fragen der Migrationsprozesse wollten die Politiker damit beantworten? Aufgrund der parlamentarischen Interventionen vom Januar 1903 wird uns eine Reihe von Verwaltungs- und Sicherheitsproblemen mit der Ein-wanderung verbunden bekannt.

Der Gesetzvorschlag wollte damit die Einwanderung regeln, strenger machen und erfassen: „damit sich kein Ausländer im Bereich des Landes ohne Anmeldung und Wissen der zuständigen Ämter aufhalten kann, damit der Ausländer verfolgt und beim Bedarf entfernt werden kann, bevor er noch dem Staat irgendwelchen Schaden verursachen würde.“[5]

Bei der Diskussion der Frage hat das größte Problem bedeutet, dass über die ungarische Auswanderung relativ genaue Daten zur Verfügung gestanden haben, was man von der Anzahl und Zusammensetzung der Einwanderer nicht behaupten kann. Bei der Diskussion des Gesetzvorschlages wurde die sich darauf beziehende pejorative Feststellung auch mehrmals erwähnt:

„.. es ist abnormal, was auch heute herrscht, dass wir über die Anzahl der sich in unserem Land aufhaltenden Ausländer gar keine Ahnung haben.“[6]

„Über das Ausmaß der Einwanderung behaupten der geschätzte Vortragende und selbst der Bericht, dass es nicht festgestellt werden kann, wir haben darüber keine Information.“[7]

Die statistische Aufstellung war in dieser Zeit nicht entsprechend. Über die Verteilung der Nationalität und Konfession

[4] 1903. évi VI. törvénycikk az utlevélügyről [Gesetzartikel VI/1903 über die Reisepässe], eigene Übersetzung http://www.1000ev.hu/index.php ?a=3&param=6874 [cit. 2013-08-07].

[5] 179. országos ülés 1903. január 9-én, pénteken*, in Az 1901-1906. évi országgyűlés képviselőházának naplója*, X. kötet [179. Landessitzung vom 9. Januar 1903, Freitag, Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X], 1902, Atheneum, Budapest, 203.

[6] Ibid. 203.

[7] Ibid. 208.

der Landesbewohner haben zwar genaue Daten zur Verfügung gestanden, aber über die Anzahl der eingesiedelten Ausländer gab es keine genaue Datenerfassung.

Für die Abgeordneten hat die Definierung und Identifizierung der ausländischen Einwanderer auch ein Problem bedeutet, dass kommt folgendermaßen aus den Reden hervor:

„Ein Teil der Einwanderer stammt aus Russland, die durch Galizien in unser Land kommen, ihr Großteil bleibt in Österreich, die »Schlacke« kommt zu uns, vielleicht weist Österreich sie zu uns aus. Aber den Großteil der Ausländer machen die Österreicher aus. Wenn aber die solchen österreichischen Landesangehörigen von den österreichischen Behörden aus dem Land mit der Vorwand ausgewiesen werden, dass sie nicht genug Geld haben, um mit der Eisenbahn in ihre Gemeinden abgeschoben werden zu können, nimmt man von ihnen an der Grenze einfach Abschied, aber sie kommen auf einem Umweg zurück ins Land und unsere Verwaltungsbehörden können mit dem Verfahren neu beginnen.“[8]

Die Vision der übertriebenen Einwanderung aus Galizien, die uns aus den parlamentarischen Reden bzw. der zeitgenössischen Presse bekannt geworden ist, lassen auch mehrere Faktoren ahnen. János Gyurgyák hat es auf zwei Hauptgründe zurückgeführt. Einerseits darauf, dass die Zeitgenossen den Umzug der östlichen Juden von der Einwanderung nicht unterscheiden konnten. Andererseits schien die Urbanisation des heimischen Judentums und die interne Migration so, als wäre es eine externe Einsiedlung ins Land.[9] János Gyurgyák macht uns aber aufgrund seiner Recherchen darauf aufmerksam, dass „die demographischen Daten eindeutig

[8] 179. országos ülés 1903. január 9-én, pénteken*, in Az 1901-1906. évi országgyűlés képviselőházának naplója*, X. kötet [179. Landessitzung vom 9. Januar 1903, Freitag, Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X], 1902, Atheneum, Budapest, 205.

[9] GYURGYÁK, JÁNOS: *A zsidókérdés Magyarországon: Politikai eszmetörténet* [Judenfrage in Ungarn: Politische Ideengeschichte], 2001, Osiris, Budapest, 76-77.

beweisen, dass sich die Einwanderung der östlichen Juden nach Ungarn in der Zeit vom Dualismus wesentlich vermindert hat.“[10]

In der Zeit vom Dualismus unterscheiden sich drei Gruppen des in die Städte strömenden ungarischen Judentums. Die erste Gruppe kam aus den heimischen Großgutzentren, sie waren die Mieter und Aufkäufer landwirtschaftlicher Produkte der damaligen Kammer- und Gutswirtschaften. In die zweite Gruppe können die Personen eingestuft werden, die in erster Linie durch ihre Geschäftsbeziehungen hergesiedelt sind, sie stammen aus den tschechisch-mährischen Provinzen bzw. aus Österreich und Ostpreußen. Die dritte Gruppe bestand aus den Bürgern des zerfallenen Polens und der Ukraine bzw. kam aus der Richtung der galizischen Provinz des Habsburgreiches.[11] Diese letzte Gruppe lässt sich durch ihre Halbbauerlebensform bezüglich ihrer Kultur und Lebensführung von den anderen zwei Gruppen unterscheiden. Mit dieser letzten Gruppe waren die von Stereotypen oft nicht freien Behauptungen verbunden.[12]

Der Notar László Nyegre, der Vortragende des parlamentarischen Vorschlags hat in seiner parlamentarischen Rede bezüglich der konkreten Maßnahmen Folgendes hervorgehoben: „Sehr geschätztes Hohes Haus, wenn wir diesen abnormalen Zustand betrachten, so können wir zweifellos feststellen, dass wir diese Lage lösen müssen; wir müssen es durch solche Gesetzgebungsmaßnahmen lösen, die einerseits in dem eigenen Interesse des Staates, das Prinzip Salusreipublicae[13] vollständig sichern, andererseits den

[10] Ibid. 78.

[11] CSORBA, LÁSZLÓ: *A tizenkilencedik század története* [Die Geschichte des neunzehnten Jahrhunderts], 2000, Pannonica Kiadó, Budapest, 233.

[12] „Ich würde unter den galizischen Juden mehr anständige Leute finden, als unter den Raubmördern und Anarchisten, die aus Rumänien zu uns kommen, weil wir die Raubmörder nicht ausgeben. Jene Individuen halte ich für viel gefährlicher als die galizischen Juden, obwohl diese auch gefährlich genug sind.“ 181. Landessitzung vom 12. Januar 1903, Montag. KN 252.

[13] Bedeutung von Salusreipublicae (Supremalexesto): das Heil der Republik ist das höchste Gesetz.

Freiverkehr durch keine überflüssigen Störungen hindern, keine erworbenen Rechte betreffen und keinen Grund auf die Retorsion seitens ausländischer Staaten geben."[14]

Obwohl die Abgeordneten darüber Bescheid wussten, wie streng die Vereinigten Staaten, sogar die australischen Kolonien und die einzelnen Nachbarstaaten die Einwanderungsfrage behandeln, haben sie lieber als liberal zu bezeichnende Maßnahmen über die Regelung der Einwanderung erbracht.

1.2. Die Frage der Auswanderung

„Ich glaube, dass die andere Absicht dieses Gesetzvorschlages ist, die Zwangsauswanderung zu beschränken"[15] – wie der Abgeordnete, Ödön B. Solymossy bei der parlamentarischen Diskussion die Anwesenden darauf aufmerksam gemacht hat. Er hat bemerkt, dass die Auswanderer[16] in ein paar Jahren zu Einwanderer werden. Die Fassung des Gesetzes IV/1903 stimmt mit dieser Denkweise vollständig überein, nach der sich die Bezeichnung Auswanderer nicht auf eine Person bezieht, die das Land verlässt, um sich anderswo zu niederlassen, sondern auf eine Person, „die zwecks dauerhaften Lebenserwerbs auf unbestimmte Zeit ins Ausland fährt."(§ 1)

Diese Auffassung wird von den Fachliteraturforschungen im Zusammenhang mit der Auswanderung und dann mit der Rückwanderung sowie von den statistischen Daten von 1905-1915

[14] 179. országos ülés 1903. január 9-én, pénteken*, in Az 1901-1906. évi országgyűlés képviselőházának naplója*, X. kötet [179. Landessitzung vom 9. Januar 1903, Freitag, Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X], 1902, Atheneum, Budapest, 202.

[15] 179. országos ülés 1903. január 9-én, pénteken*, in Az 1901-1906. évi országgyűlés képviselőházának naplója*, X. kötet [179. Landessitzung vom 9. Januar 1903, Freitag, Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X], 1902, Atheneum, Budapest, 213.

[16] 1903. évi V. törvénycikk a külföldieknek a magyar korona országai területén való lakhatásról [Gesetzartikel IV/1903], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=68762 [cit. 2013-08-07].

auch bestätigt. Während der Zeit des Dualismus haben cca. 2,3 - 2,4 Millionen Auswanderer Amerika und Rumänien als Reiseziel gewählt. Die Forscher betrachten die Gerissenheit und Überschuldung der Bauerhöfe als Hauptgrund der Auswanderung. Die am meisten betroffenen Gebiete waren die nordöstlichen Komitate und ihre Nachbarregionen. Die Mehrheit der auswandernden Bauer hat die Auswanderung als vorübergehend betrachtet, ihr Ziel war nämlich, sich mit dem in Amerika verdienten Geld später um ihre Lebenshaltung zu Hause zu finanzieren. Ein Viertel der Auswanderer ist wirklich zurückgekehrt.[17]

In der Zwischenzeit hat der Kongreß der Vereinigten Staaten das Einwanderungsgesetz strenger gemacht, 1891 wurden die Personen, die an gefährlichen Krankheiten litten, die Polygamen, die Personen mit unmoralischem Verhalten und die Vorbestraften ausgeschlossen. Diese Maßnahme hat noch nicht die Reduzierung der Anzahl der Einwanderer sondern die Sicherung einer gesunden, anstellbaren Arbeitskraft erzielt. Das Einwanderungsgesetz von 1893 hat die sofortige Anmeldung der eingeschifften ausländischen Passagiere beim logistischen Einwanderungsoffizier vorgeschrieben, um sie nach ihrem Status fragen und von den Ärzten des Marinehospitaldienstes untersuchen lassen zu können. 1903 wurde die Liste der Einwanderer[18] mit den Epileptikern, Berufsbettlern, Kupplern, Anarchisten und den Anwendern politischer Gewalt reduziert.

Herr Loránt Hegedűs hat bei der Prüfung der ungarischen Auswanderungspolitik des Dualismus schon 1899 festgestellt: „Die Lage schaut bei uns wirklich so aus, dass wir überhaupt kein Einwanderungsgesetz haben, wobei auch schon Dänemark ein

[17] CSORBA, LÁSZLÓ: *op. cit.* 426. sowie die Daten von 1905-15: Er wanderte aus Amerika ins Territorium des ungarischen Reiches vor der Trianonzeit: 247 193 Personen. *Sehen Magyar Statisztikai Szemle*, 1938, 38.

[18] PUSKÁS, JULIANNA: Az Egyesült Államok bevándorlási politikája (1890-1990) [Die Einwanderungspolitik der Vereinigten Staaten (1890-1990)], in *Régió – Kisebbség, Politika, Társadalom,* Vol. 4. Nr. 4. (1993), http://epa.oszk.hu/00000/00036/00015/pdf/10.pdf [cit. 2013-09-15].

Gesetz darüber erbracht hat (15. Mai 1875), unabhängig davon, wie unbedeutend diese Frage dort ist. Wir haben ebenso kein Gesetz, das die Auswanderung selbst betreffen würde und von der Regelung der Auswanderung, usw. handeln würde, insgesamt gibt es nur den Gesetzartikel L/1879 über die Regelung der ungarischen Staatsbürgerschaft und den Gesetzartikel XXXVIII/1881 über die Regelung der Auswanderungsagenten direkt als eine Art von Regelung, das ist aber wenig.“[19] Der Gesetzartikel XXXVIII/1881 handelt davon, wer Auswanderungsagent sein kann, aber bei den Auswanderern werden nur diejenigen erwähnt, denen die Auswanderung verboten wird. Der Gesetzartikel XXXVIII/1181 über die Auswanderungsagenten regelt streng die Agententätigkeit.[20] Das war einerseits nötig, weil die deutschen Schiffgesellschaften einen enorm hohen Geschäftsgewinn erworben haben, andererseits haben ihre Agenten die Bewohner mit falschen Versprechungen gelockt.

Wir müssen mit der Feststellung von László Csorba einverstanden sein: „Die Wahl des Wohnortes und der Lebensunterhaltung haben die Entscheidungsträger in einer Periode, die in Bezug auf die bürgerlichen Freiheitsrechte als liberal bezeichnet werden kann, nur die Regelung und nicht die administrative Verhinderung des Prozesses als eigene Aufgabe betrachtet.“[21] Eine ähnliche Denkweise hat auch der 1903 angenommene Auswanderungsgesetzartikel Nr. IV bestimmt. Nach den Bestimmungen der Begründung des Auswanderungsgesetzes[22] sollen die gesetzlichen

[19] HEGEDŰS, LORÁNT: *A magyarok kivándorlása Amerikába* [Ungarische Auswanderung nach Amerika], 1899, Budapest, 52-53.

[20] 1881. XXXVIII. tc. a kivándorlási ügynökségekről [Gesetzartikel XXXVIII/1881 über die Auswanderungsagenten], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=5995 [cit. 2013-11-20]. *Siehe dazu* PÁLVÖLGYI, BALÁZS: A magyar kivándorlási politika kezdetei (1881-1903) [Anfangszeiten der ungarischen Auswanderungspolitik (1881-1903)], in *Jogtörténeti Szemle*, Vol.12. No. 4. (2010) 27-34.

[21] CSORBA: *op. cit.* 427.

[22] Az 1902. évi május hó 19-ére hirdetett Országgyülés Képviselőházának irományai, Hiteles kiadás [Begründung zum Gesetzvorschlag über die Auswanderung, Schriften des Abgeordnetenhauses des für 19. Mai 1902

Maßnahmen von dem Grundprinzip ausgehen, dass die Auswanderung nicht ganz aufgehoben werden kann, weil es gegen das Freizügigkeits- und Selbstbestimmungsrecht stoßen würde.

Wir erhalten in der Begründung eine Erklärung auch darauf, dass im Zusammenhang mit der Anzahl der Auswanderer keine verwendbaren Daten zur Verfügung gestanden haben, weil die Einwanderungsdaten der Vereinigten Staaten die Einwanderer im Zeitraum von 1899-1901 nicht nach ihrer Heimat sondern nach ihrer Nationalität erfasst haben.[23]

2. Regelung über die Wohnlage der Fremden in Ungarn vor der Erbringung des Gesetzes V/1903

2.1. § 15 vom Gesetzartikel XXII/1886

Zunächst lohnt es sich, den Vorschlag von Dániel Irányi zu erwähnen, der als Mitglied der Unabhängigkeitspartei 1885 im Abgeordnetenhaus einen Gesetzvorschlag eingereicht hat. Bei der parlamentarischen Diskussion des Gesetzes V/1903 hat der Vortragende des Themas auch darauf hingewiesen und hervorgehoben, dass die Grundidee des Vorschlages richtig war, da sie die Zuständigkeit für die Verwaltung der Zuzugs- und Niederlassungsbewilligung nicht mehr den Gemeinden sondern dem Vizegespan zugeordnet hat. Der Gesetzvorschlag wurde aus der Tagesordnung gelöscht, weil der damalige Innenminister, Kálmán Tisza die Angelegenheit in Bezug auf die Revision des Gemeindegesetzes lösen wollte.[24] Der § 15 vom Gesetzartikel XXII/1886 hat die

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angekündigten Parlamentes, beglaubigte Ausgabe, Band XXIII.], 1902, Pesti Könyvnyomda-Részvény-Társaság, Budapest, 401-414.

[23] Die überseeische Auswanderung hat sich 1901 aufgrund der Quelle Nr. 22 auf 70 911 erhöht.

[24] 179. országos ülés 1903. január 9-én, pénteken*, in Az 1901-1906. évi országgyűlés képviselőházának naplója*, X. kötet [179. Landessitzung vom 9. Januar 1903, Freitag, Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X], 1902, Atheneum, Budapest, 206.

Einwanderungsfrage geregelt, aber die Mängel der Vollstreckung haben auch in diesem Fall zu einer ungeregelten Lage der Ausländer auf dem Territorium vom Königreich Ungarn geführt.

Der Gesetzartikel von 1886 hat den Angehörigkeitserwerb der Ausländer kurz und bündig bestimmt. „Dank der korrekten Regelung oder vielleicht, weil wenige Ungarn als neue Heimat gewählt haben, hat die Innenregierung nach den Fakten mit der Ausdeutung vom § 15 wenig Problem gehabt.“[25]

Der § 15 lautet wie folgt: „Der Ausländer kann in der Gemeinde wohnen, sich niederlassen und in den Gemeinden-verband aufgenommen werden.“

Der Begriff des ständigen Wohnens wurde eingeführt und die Bedingungen der Erteilung der Zuzugsgenehmigung wurden auch festgelegt. „Wer in einer Gemeinde ständig ansässig werden will, soll er es anmelden und wenn er bestätigt, dass er sich und seine Familie ohne Belastung der Gemeinde dauerhaft unterhalten kann, kann dessen Zuzugsgenehmigung nur im Falle des wohlbegründeten Verdachtes seiner Immoralität abgelehnt werden – durch Sicherung der Möglichkeit auf die Selbstbestätigung.

Wenn der Ausländer nach 3 Monate übersteigendem Aufenthalt in einer Gemeinde trotz der Aufforderung des Magistrates seine Wohnabsicht innerhalb von, in der Aufforderung angegebenen 8 Tagen nicht anmeldet, begeht er eine Kontravention, die von dem Verwaltungsamt mit einer Geldstrafe von max. 300 HUF (Ungarischen Forint) zu bestrafen ist; und wenn er trotz der Aufforderung seine Wohnabsicht nicht anmeldet oder wenn er keine Zuzugsgenehmigung erhält und den Ort trotzdem nicht verlassen will, kann er durch die Polizei abgeschoben werden.

Eine Wohnabsicht ist zu ahnen, wenn sich der Ausländer 3 Monate lang in der Gemeinde aufhält.“

Der nächste Schritt in Bezug auf die Niederlassung des Ausländers ist der Erwerb der Niederlassungserlaubnis: „Eine

[25] POMOGYI, LÁSZLÓ: *Szegényügy és községi illetőség a polgári Magyarországon* [Armenwesen und Gemeindeangehörigkeit in dem bürgerlichen Ungarn], 2001, Osiris, Budapest, 63.

Niederlassungserlaubnis kann jemand bei Erfüllung der Bedingungen in Bezug auf die Staatsbürger beantragen, wenn er seine zweijährige ständige Wohnung und sein moralisches Wohlverhalten bestätigt hat."

Auch Ausländer sollen die Gemeindeangehörigkeit endgültig erwerben, da alle Staatsbürger in die Zuständigkeit einer Gemeinde fallen sollen. „Die Aufnahme in den Gemeindeverband kann jemand nur beim Bestehen einer Indigenatszustimmung erwerben und die Gemeinde kann ihm die Aufnahme anbieten bzw. das Indigenat erteilen, wenn er im Land schon 5 Jahre lang gewohnt hat."[26]

2.2. Die Rolle der Gemeindeangehörigkeit

Die Gemeindeangehörigkeit wurde von dem offenen kaiserlichen Befehl vom 24. April 1859 eingeführt. Er ist auf den ungarischen Territorien im Sinne der Verordnung des Innenministeriums, Nr. 7863/1869. nicht verbindlich in Kraft getreten.[27]

In der österreichischen Regelung wurde der Begriff der „Gemeindeangehörigkeit" neben der Staatsbürgerschaft als wichtigste rechtliche Bestimmung des Individuums betrachtet. Die Gemeindeangehörigkeit hat für ihre Bürger in der jeweiligen Gemeinde den störungsfreien Aufenthalt gesichert, das hat sich aber auf die sogenannten „Fremden" nicht bezogen; das konnte hauptsächlich bei Armut oder kleinerer Kriminalität dahinführen, dass Letztere aus der Gemeinde abgeschoben wurden. Die Bezeichnung „Einheimische" konnte nur ab 1901 nach vieljährigem Aufenthalt in einem Ort als Bedingung erworben werden, so haben sich bei den großen Einwanderungen des 19. Jahrhunderts die ursprünglich zum Großteil übereinstimmenden Geburts-, Aufenthalts- und heimischen Gemeinden immer mehr voneinander

[26] 1886. évi XXII. törvénycikk a községekről [Gesetzartikel XXII/1886 über die Gemeinden], eigene Übersetzung http://www.1000ev.hu/index.php ?a=3&param=6215 [cit. 2013-11-11].
[27] POMOGYI: *op. cit.* 15.

entfernt. Die Gemeindeangehörigkeit überging von dem Mann auf die Frau und die Kinder.[28]

„Die Rechtsform der Zugehörigkeit zu der Gemeinde ist die Gemeindeangehörigkeit. Nur die persönliche Verbindung zwischen dem Individuum und der Gemeinde, die von dem Wohn- und Aufenthaltsort unabhängig ist. Alle Staatsbürger müssen zu einem Gemeindeverband gehören. Jeder kann nur zu einem Gemeindeverband gehören. Die Gemeindeangehörigkeit kann durch Geburt, Adoption, Ehe oder durch oder ohne Ansiedlung auch durch die entschlossene Aufnahme in den Gemeindeverband erworben werden. Das Gemeindegesetz enthält ausführliche Bestimmungen (§§ 5-18) bezüglich der Gemeindeangehörigkeit und deren Erwerb.“[29]

Zur Prüfung des Heimatrechtsverhältnisses als Ganze scheint die Vorstellung der Maßnahmen der Epoche, die außer des als Essay bezeichneten Zeitintervalls fallen, auch nötig zu sein. Wir sollen über die Gemeindeangehörigkeit wissen, dass sie ganz bis 1948[30] gültig war. Nach László Pomogyi war bis 1921 der Besitz der ungarischen Staatsbürgerschaft die Bedingung des Erwerbs der Gemeindeangehörigkeit, wobei es nach 1921 eben umgekehrt war.[31] Das Vertrag von Trianon hat die Gemeindeangehörigkeit zu einem der Grundinstitute des ungarischen öffentlichen Rechtes gemacht, dadurch, dass es als ausschließliche Vorbedingungen der Anerkennung der Staatsbürgerschaft die Bestätigung der

[28] In der Zeit der Jahrhundertwende war nur 38,0 % der Stadtbevölkerung in Wien heimatzuständig nach Wien, also 62% galt als „fremd“. JOHN, MICHAEL – LICHTBLAU, ALBERT: Bécs, a befogadó város [Schmelztiegel Wien] in *História,* Vol. 16. Nr. 5-6. (1994), http://www.tankonyvtar.hu/hu/tartalom/historia/94-056/ch18.html [cit. 2013-09.10].

[29] MAGYARY, ZOLTÁN: *Magyar közigazgatás* [Ungarische Verwaltung], 1942, Királyi Magyar Egyetemi Nyomda, Budapest, 305.

[30] 1948. évi LXI. törvénycikk a községi illetőség megszüntetéséről [Gesetzartikel LXI/1948 über die Aufhebung der Gemeindeangehörigkeit], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=9732 [cit. 2013-10-12].

[31] POMOGYI: *op.cit.* 62.

Gemeindeangehörigkeit erwünscht hat. Dieser Fehler des Friedensvertrags von Trianon hat zu schwierigen Störungen geführt.[32] Der § 24 des Gesetzes XVII/1922 hat ausgesagt, dass in der Frage, ob die Gemeindeangehörigkeit einer Person am Tag des Inkrafttretens des Friedensvertrages von Trianon auf dem infolge des Friedensvertrages von Trianon abgerissenen Bereich Ungarns war, und seit wann und ob sie auf dieser Grundlage im Sinne der Artikel 61 und 62 des Friedensvertrags von Trianon ihre ungarische Staatsbürgerschaft verloren hat, beschließt der Innenminister in erster und gleichzeitig letzter Instanz.

Die Gemeindeangehörigkeit der Person, die sich über die Aufrechterhaltung bzw. den Rückerwerb ihrer bisherigen ungarischen Staatsbürgerschaft aufgrund des Artikels 63 des Friedensvertrages oder über den Erwerb der ungarischen Staatsbürgerschaft aufgrund des Artikels 64 des Friedensvertrages erklärt (optiert) hat und von der Feststellung der ungarischen Staatsbürgerschaft an aufgrund der Optierungserklärung bis zum Tag des Inkrafttretens des vorliegenden Gesetzes aufgrund des Gesetzartikels XXII/1886 in einer inländischen Gemeinde noch keine Angehörigkeit erworben hat – beschließt der Innenminister in erster und gleichzeitig letzter Instanz.[33]

Die Verordnung des Innenministeriums Nr. 167.335/1922 über die Vollstreckung der Staatsbürgerschafts- und Angehörigkeits-bestimmungen regelt, dass die Feststellung der im Zeitpunkt des Inkrafttretens des Friedensvertrages, d. h. am 26. Juli 1921 bestehenden Gemeindeangehörigkeit auch in dem Fall in die Zuständigkeit der inländischen Behörde fallen solle, wenn die betroffene Gemeinde aufgrund des Friedensvertrages auf einem, von

[32] POMOGYI: *op.cit.* 64.

[33] 1922. évi XVII. törvénycikk az 1922/23. költségvetési év első hat hónapjában viselendő közterhekről és fedezendő állami kiadásokról [Gesetzartikel: XVII/1922 über die in den ersten sechs Monaten zu zahlenden öffentlichen Lasten und zu deckenden Staatsausgaben des Verwaltungsjahres 1922/23], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=7528 [cit. 2013-10-12].

Ungarn abgerissenen Gebiet liegt und dadurch schon unter Fremdhoheit kam.

Zoltán Magyary betont, dass „die praktische Bedeutung der Angehörigkeit fast vollständig aufgehoben wurde, weil unsere neuen Rechtsnormen im Rahmen eines Verwaltungsverfahrens nicht die zuständige Gemeinde sondern den Wohnort als Grundlage nehmen (Verordnungsnummer: 6000/1931. M. E). Das ist einerseits begründet, weil sich die Leute auf ihrem Wohnort und nicht in der eventuell davon abweichenden zuständigen Gemeinde aufhalten, andererseits weil die Feststellung des Wohnortes eine Tatfrage und die Angehörigkeit eine Rechtsfrage ist und so ist die Entscheidung des Wohnortes viel einfacher und schneller."[34]

2.3. Die Wohnverhältnisse der Ausländer regelnde Verordnungen

Die Wohnverhältnisse der Ausländer haben neben dem schon erwähnten Gesetzartikel XII/1886 § 15 die 1888 erlassene Verordnung des Innenministeriums, Nr.: 54 091, die aufgrund deren erstellten Komitatsstatuten, die 1885 erlassene „Abschieberegelung" vom Innenministerium, Nr.: 9389 geregelt.[35]

Die 1888 unter der Nr. 54 091 erlassene Verordnung des Innenministeriums hat sich bezüglich des Gesetzartikels XXII/1886, Abschnitt 15 über den Aufenthalt der Ausländer mit der Erfassung der sich in Gemeinden (Klein- und Großgemeinde, Stadt mit geordnetem Rat) aufhaltenden Ausländer beschäftigt. Es hat vorgeschrieben, dass die Statuten der Gemeinden in Bezug auf die Ausländer auch ergänzt werden müssen.

Im Zusammenhang mit der Wohnfrage der Ausländer soll die Schieberegelung des Innenministeriums aus dem Jahre 1885 erwähnt werden. Die Abschiebung hat die Zuweisung in die zuständige Gemeinde bedeutet – in bestimmten Fällen durch Zwang. Diese Maßnahme konnte außer der Strolche, Arbeitsscheuen, Bettler, die

[34] MAGYARY: *op. cit.* 305.

[35] WETZEL, TAMÁS: *A bevándorlás kérdése Magyarországon* [Einwanderungsfrage in Ungarn], http://www.publikon.hu/userfiles/File/wetzel_vfinal.pdf [cit. 2013-10-12].

unerlaubt gebettelt haben, Prostituierten, die gegen die Vorschriften gestoßen haben, ehemaliger Häftlinge auch bei Ausländern angewendet werden. Die Abschiebung war eine vorbeugende Polizeiverordnung, der die Auffassung zu Grunde gelegen hat, dass das primäre Subjekt der Sorge und Haftung für das Individuum die Gemeinde ist.[36]

„Die Rechtsordnung schreibt vor, dass keiner, gegen den kein Abschiebebescheid aufgrund einer regelmäßigen Verhandlung durch die zuständige Behörde erstellt wurde, abgeschoben werden kann. Sobald der Abschiebebescheid erbracht wurde, ist die Feststellung der Gemeindeangehörigkeit die Hauptaufgabe der Abschiebebehörde …“[37] Die Zuweisung in eine Gemeinde hatte zwei Arten: die erste war die Zuweisung durch einen Zwangsreisepaß, die andere war die Anwendung der Abschiebung bei den in Bezug auf den öffentlichen Frieden und die Staatssicherheit gefährlichen Individuen, Streunern und Fremden.

Sogar den Ausländern stand die Freiheit des Aufenthaltes, der Niederlassung, der Vereingründung, Versammlung und Wohnortänderung zu, aber ihre Freiheit war im Vergleich zu der Freiheit der Einheimischen auf einigen Bereichen nicht gleich gesichert. Die Ausländer konnten nämlich vom Landesterritorium auf dem Gerichts- und Verwaltungsweg auch ausgewiesen werden.[38]

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[36] SZIKINGER, ISTVÁN: *Rendvédelmi jog a dualizmus korszakában* [Das Ordnungsschutzrecht in der Dualismuszeit, geschichtliches Ruheschutzheft], in *Acta Historiae Preasidii Ordinis*, Vol. 22. Nr. 26. (2012), http://epa.oszk.hu/02100/02176/00012/pdf/EPA02176_rendevedelem_tor teneti_fuzetek_2012_26_141-157.pdf [cit. 2013-11-03].

[37] 1885-ös 9389. számú Belügyminiszteri körrendelet, in *Magyarországi Rendeletek Tára,* 1885., Magyar Királyi Belügyministerium, Budapest, 165. [Zirkularverordnung des Innenministers aus dem Jahre 1885, Nr.: 9389 Ungarisches Verordnungsblatt], 1885, Budapest, 165.

[38] KMETY, KÁROLY: *A magyar közigazgatási jog kézikönyve* [Ungarisches öffentliches Recht], 1926, Grill Károly Könyvkiadó Vállalata, Budapest, 94-95.

3. GESETZ V/1903 – MIT BESONDERER RÜCKSICHT AUF DIE PRÜFUNG DER POLIZEIBEHÖRDE

Die Abgeordneten haben den § 15 des schon mehrmals erwähnten Gesetzartikels XXII/1886 aus zwei Gründen nicht für geeignet gehalten und es hat auch die Begründung des Gesetzes enthalten:

> „1. die für den Erwerb der Zuzugsgenehmigung bestimmten 3 Monate sind zu lang, um überprüfen zu können, ob der Ausländer der Gemeinde oder dem Staat Schaden verursacht hat und seine Ausweisung ist auch schwieriger, da er sich während dieser Zeit schon sozusagen eingenistet hat;
> 2. die Kontrolle der Ausländer, diese ausgezeichnete Staatsaufgabe weist das Gesetz an die Gemeinden, wobei – hauptsächlich die Stadtobrigkeiten der Klein- und Großgemeinden für die Staatsinteressen – oft kein Gefühl, keine genügende Fähigkeit zu der Erfüllung dieser Aufgabe haben, da – wie es die Erfahrungen zeigen –, die Erfassung der Ausländer in vielen Gemeinden, besonders an der nordöstlichen Grenze des Landes, wo Fremde massenhaft wohnen und die Kontrolle erhöht wichtiger ist, mangelhaft ist und so überhaupt nicht dem Ziel dient.“[39]

Die Begründung hat festgestellt, dass diese Lage durch die Revidierung der einschlägigen Maßnahmen des Gemeindegesetzes gelöst werden könnte. Das wurde aber mit Bezug auf die Schwierigkeiten (das Problem könnte nur mit der Lösung des ganzen Gemeindewesens behandelt werden) und die lange Zeitdauer abgelehnt. So bewies sich die Erschöpfung eines Sondergesetzes als sinnvollster Weg, da nur dieses geeignet schien, die Wohnlage der

[39] Az 1902. évi november hó 5-ére hirdetett Országgyülés Főrendiházának irományai [Begründung zum Gesetzvorschlag über die Wohnlage der Ausländer auf den Bereichen der Ungarischen Krone in Schriften vom Magnatenhaus des zum 5. November 1902 angekündigten Parlamentes, Beglaubigte Ausgabe, Band IV], 1903, Pesti Könyvnyomda-Részvény-Társaság, Budapest, 288-292.

gefährlichen Ausländer auf dem Bereich des ungarischen Staates zu kontrollieren.

Die wichtigste Forderung war bei Zielerreichung dieses Systems, dass die bestimmte lokale Behörde über die Ankunft des Ausländers unverzüglich Bescheid kriegen musste, um dessen Kontrolle vom Anfang an üben zu können und zwar ohne Betreffen der Prinzipien des freien Verkehrs und der Freizügigkeitsfreiheit, dadurch konnte die lokale oder beim Bedarf die zentrale Behörde auch die genaue Erfassung der Ausländer besitzen.[40]

Die Abgeordneten haben sich die Kontrolle der Ausländer auf zweierlei Art vorgestellt. Nach der einen Vorstellung wären die Grenzübergänger schon beim Grenzübergang kontrolliert gewesen, nach der anderen Version hätte man es innen, auf dem Landesterritorium, auf dem Aufenthaltsort der Fremden durchgeführt. Diese Denkweise hat an der Jahrhundertwende zu der Herausbildung der spezifischen Organisationsstruktur der Fremdenpolizei geführt. Obwohl bei der parlamentarischen Diskussion die Möglichkeit der Verfolgung des amerikanischen Musters mehrmals erwähnt wurde, nach dem die Ausländer schon an der Landesgrenze kontrolliert werden müssten, wurde die Organisation der Fremdpolizei auf den als Problemfall geltenden rumänischen und nördlichen und nordöstlichen Gebieten errichtet.[41] Im Hintergrund der Entscheidung stand die Auffassung der liberalen politischen Elite, die das Prinzip der Unbeschränktheit bezüglich der Freizügigkeit vertreten hat. Diese Denkweise kann aus der Hinsicht der Folgezeit modern und reformerisch betrachtet werden.

Nach der Übersicht der Vorgeschichte des Gesetzes V/1903 prüfe ich die Bestimmungen des Gesetzes, die sich mit den als Fremdpolizei dienenden lokalen Behörden beschäftigen. Da, wie es bei der parlamentarischen Diskussion auch von Ferencz Buzáth festgestellt wurde: „die wichtigste Maßnahme des Gesetzvorschlages zweifellos der Artikel 14 ist, nach dem ab nächstes Jahr bezüglich

[40] Ibid. 288-289.

[41] In dieser Periode gab es zwischen den österreichischen Erbbundesländern und dem Königreich Ungarn keine Kontrolle an der Grenze.

der Wohnlage in den Gemeinden und der Aufnahme in den Gemeindeverband nicht die Obertheit der Gemeinden sondern die den Oberstuhlrichter vertretende Behörde in den Klein- und Großgemeinden und in Städten mit geordnetem Rat und in den königlichen Freistädten die vorgehende Polizeibehörde beschließen wird."[42]

Die Abgeordneten haben sowohl in der allgemeinen Begründung als auch bei der parlamentarischen Diskussion mehrmals auf die Erfolglosigkeit der von den Gemeinden bisher geübten Kontrolle hingewiesen. Deshalb hat das Gesetz die Kontrolle der Ausländer auf die Polizeibehörde erster Instanz übertragen. Der § 14 zählt diese Polizeibehörden bezüglich der Gemeinden auf. Das Gesetz enthält auch, dass Einspruch gegen die Endbeschlüsse der Behörden statthaft ist, was aus den allgemeinen Prinzipien des Verwaltungsrechtes kommt.

Aus dem Bericht der Verwaltungskommission[43] erhalten wir eine Erklärung auf die unbedeutende „Discretionarius-Befugnis der Polizeibehörde".[44] Die Kommission betont, dass diese Frage auf polizeilichem Weg so gelöst werden kann, wenn ein umfangreiches Discretionariusrecht damit verbunden ist. Ohne entsprechende Mittel kann das gewünschte Ergebnis nicht erreicht werden. Die Berichtersteller machen uns auch darauf aufmerksam, dass die Vollstreckung des Gesetzes neue Lasten auf die Verwaltung legt. Gleichzeitig wurden aber die Aufstellung der Grenzpolizei und deren behördliche und Polizeigerichtsbarkeitsbefugnis positiv beurteilt.

[42] Buzáth hat zwar darin die Verletzung der Gemeindenautonomie entdeckt und in Bezug darauf den Gesetzvorschlag abgelehnt. KN 206.

[43] 1901. évi október 24-ére hirdetett Országgyűlés Képviselőházának Irományai, XX. kötet [Schriften des Abgeordnetenhauses des zum 24. Oktober 1901 angekündigten Parlamentes, Band XX], 1903, Athenaeum, Budapest, 40.

[44] Diskrezionale Befugnis: der Rechtsanwender hat die Möglichkeit, die Bedingungen seiner Entscheidung zu bestimmen, ohne irgendeiner Regel in dieser Hinsicht entsprechen zu sollen.

4. ZUSAMMENFASSUNG

Zusammengefasst kann festgestellt werden, dass zwei Bedingungen bezüglich der entsprechenden Lösung in Erfüllung gehen sollen, um die Wohnlage der Ausländer kontrollieren zu können. Die eine ist: die Erschaffung der selbständigen gesetzlichen Regelung, die zweite ist: die Errichtung solcher Organisationen, deren Zuständigkeit genau geregelt ist.

> „Unter den, im § 14 des Gesetzes stehenden Ämtern sind zu verstehen:
> 1. in Ungarn:
> a) in den Klein- und Großgemeinden der Oberstuhlrichter; in den Gemeinden Ujpest und Rákospalota der Hauptmann des Bezirks Ujpest der hauptstädtischen Landespolizei vom Königreich Ungarn;
> b) in den Städten der Polizeihauptmann;
> c) in der Hauptstadt Budapest das Rat in Bezug auf die §§§ 3, 4, 5 und § 7, der Hauptmann oder der Stellvertreter der hauptstädtischen Landespolizei vom Königreich Ungarn in Bezug auf den § 10;
> 2. in Kroatien-Slawonien die politische Behörde erster Instand gemäß den dort gültigen Gesetzen.
> 3. in den behördlichen Bereichen der Grenzpolizei der Grenzpolizeihauptmann; gegen den Endbeschluß dieser Behörden ist bei den Oberbehörden ständig Einspruch statthaft.“[45]

[45] 1903. évi V. törvénycikk a külföldieknek a magyar korona országai területén való lakhatásról [Gesetzartikel V/1903 über die Wohnsituation der Ausländer in den Gebieten der Ungarischen Krone], eigene Übersetzung http://www.1000ev.hu/index.php?a=3&param=6873 [cit. 2013-09-07].

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[5] KMETTY, KÁROLY: *A magyar közigazgatási jog kézikönyve* [Ungarisches öffentliches Recht], 1905, Politzer-féle Könyvkiadóváll. kiadása, Budapest.

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[10] SZIKINGER, ISTVÁN: Rendvédelmi jog a dualizmus korszakában [Das Ordnungsschutzrecht in der Dualismuszeit, geschichtliches Ruheschutzheft], in *Acta Historiae Preasidii Ordinis*, Vol. 22. Nr. 26. (2012), http://epa.oszk.hu/02100/02176/00012/pdf/EPA02176_rendevedelem_torteneti_fuzetek_2012_26_141-157.pdf [cit. 2013-11-03].

[11] WETZEL, TAMÁS: *A bevándorlás kérdése Magyarországon* [Einwanderungsfrage in Ungarn], http://www.publikon.hu/userfiles/File/wetzel_vfinal.pdf [cit. 2013-11-12].

Gesetze, Verordnungen

[1] 1881. XXXVIII. tc. a kivándorlási ügynökségekről [Gesetzartikel XXXVIII/1881 über die Auswanderungsagenten], http://www.1000 ev.hu/index.php?a=3&param=5995 [cit. 2013-11-20] .
[2] 1885-ös 9389. számú Belügyminiszteri körrendelet [Zirkularverordnung des Innenministers aus dem Jahre 1885], in *Magyarországi Rendeletek Tára*, 1885, Magyar Királyi Belügyministerium, Budapest, 1885.
[3] 1886. évi XXII. törvénycikk a községekről [Gesetzartikel XXII/1886 über die Gemeinden], http://www.1000ev.hu/index.php?a=3&param =6215 [cit. 2013-10-11].
[4] 1903. évi V. törvénycikk a külföldieknek a magyar korona országai területén való lakhatásról [Gesetzartikel V/1903 über die Wohnlage der Ausländer in den Ländern der ungarischen Krone], http://www. 1000ev.hu/index.php?a=3&param=6873 [cit. 2013-09-07].
[5] 1922. évi XVII. törvénycikk az 1922/23. költségvetési év első hat hónapjában viselendő közterhekről és fedezendő állami kiadásokról [Gesetzartikel: XVII/1922 über die in den ersten sechs Monaten zu zahlenden öffentlichen Lasten und zu deckenden Staatsausgaben des Verwaltungsjahres 1922/23], http://www.1000ev.hu/index.php?a=3& param=7528 [cit. 2013-10-12].
[6] 1948. évi LXI. törvénycikk a községi illetőség megszüntetéséről [Gesetzartikel LXI/1948 über die Aufhebung der Gemeindean-gehörigkeit], http://www.1000ev.hu/index.php?a=3&par am=9732 [cit. 2013-10-12].

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[2] Az 1902. évi május hó 19-ére hirdetett Országgyülés Képviselőházának irományai, Hiteles kiadás [Schriften des Abgeordnetenhauses des für 19. Mai 1902 angekündigten Parlamentes, beglaubigte Ausgabe], XXIII. kötet, 1902, Pesti Könyvnyomda-Részvény-Társaság, Budapest.
[3] Az 1902. évi november hó 5-ére hirdetett Országgyülés Főrendiházának irományai [Schriften vom Magnatenhaus des zum 5.

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[4] Az 1901-1906. évi országgyűlés képviselőházának naplója, X. kötet, 1902, Atheneum, Budapest [Tagebuch des Abgeordnetenhauses des Parlamentes von 1901-1906, Band X].

Máté TRENYISÁN

Spezielle Regelungen der Arbeitgeberhaftung für Schäden – Ausnahmen von der Verschuldensunabhängigen Haftung

1. EINFÜHRUNG

In meinem früheren Schreiben sollte durch kritische Analyse der neuen Regelungen über die Befreiung des Arbeitgebers von der Schadenersatzpflicht und durch Verwendung der Erfahrungen der früheren Gerichtspraxis versucht werden, im Gebiet der manchmal schwerfälligen Methodik der Rechtsverfolgung Fortschritte zu erzielen[1]. Die Bedeutung der Forschungen in diesem Thema wird durch dessen Aktualität, durch die bedeutenden konzeptionellen Änderungen in Bezug auf das Thema sowie durch die Umsetzung der neuen Rechtsinstitute auf dem Gebiet der arbeitsrechtlichen Haftung für Schäden unterstrichen. Nicht zuletzt wird dies auch durch die Tatsache bestätigt, dass einen bedeutenden Teil der arbeitsrechtlichen Streitigkeiten die Schadenersatzprozesse

[1] TRENYISÁN, MÁTÉ: A kármegosztás és a munkáltató kárfelelősség alóli mentesülésének szabályai az új Munka Törvénykönyvében – tekintettel a bírói gyakorlatra [Regeln der Schadensverteilung und der Befreiung des Arbeitgebers von der Schadenshaftung in dem neuen Arbeitsgesetzbuch – mit Rücksicht auf die Gerichtspraxis], in KÁLMÁN, JÁNOS (Hg.): *Quot Capita, Tot Sententiae, A Batthyány Lajos Szakkollégium Tanulmánykötete* [Studiensammlung des Fachkollegiums Lajos Batthyány], 2013, Batthyány Lajos Szakkollégium, Győr, 233-249.

ausmachen, d.h. auch die praktische Bedeutung des Themas ist erheblich.

Dieses Schreiben, in dem die Ausnahmefälle von der objektiven Haftung des Arbeitgebers unter die Lupe genommen werden, ist als eine Fortführung meiner oben genannten früheren Arbeit anzusehen. Strukturell betrachtet besteht meine Analyse aus zwei Haupteinheiten. Im ersten Kapitel werden die Natur und die grundlegenden Bedingungen der objektiven Schadenshaftung des Arbeitgebers dargestellt. Im zweiten Teil werden die speziellen Ausnahmefälle von der objektiven Haftung erörtert. Im Rahmen dessen analysiert das Schreiben die Haftung des Arbeitgebers für Schäden, die in den Betrieb eingebrachten Sachen eingetreten sind, sowie die leichteren Haftungsregeln bezüglich Arbeitgeber mit begrenzten Finanzmitteln.

2. Die objektive Haftung des Arbeitgebers für Schäden gemäß dem neuen Arbeitsgesetzbuch

Das Haftungssystem im ungarischen Arbeitsrecht wurde im Gesetz Nr. I von 2012 (im Weiteren: ArbG) – ähnlich wie in dem alten Arbeitsgesetzbuch von 1992 – so ausgestaltet, dass die unterschiedliche Position der Subjekte des Arbeitsverhältnisses und ihre unterschiedliche Lage in Bezug auf die Geltendmachung von Ansprüchen berücksichtigt werden können. Auf dieser Unterscheidung basierend kann die Haftung des Arbeitnehmers dann festgestellt werden, wenn er seine sich aus dem Arbeitsverhältnis ergebenden Pflichten schuldhaft verletzt, während der Arbeitgeber für die mit dem Arbeitsverhältnis verbundenen Schäden verschuldensunabhängig haftet. Die Haftung des Arbeitgebers für Schäden setzt also kein Verschulden voraus, die reine Schadenszufügung im Zusammenhang mit dem Arbeitsverhältnis begründet die Haftung. Diese aus Sicht des Arbeitgebers außerordentlich streng geltende Regelung stützt sich auf mehrere akzeptable Gründe.

Als erstens ist hervorzuheben, dass eine der wesentlichen Pflichten des Arbeitgebers die Schaffung der Bedingungen einer gesunden und sicheren Arbeitsverrichtung ist.[2] In diesem Zusammenhang kann also die Argumentation akzeptabel sein, nach der diese strenge objektive Haftung darauf abzielt, dass der Gesetzgeber den Arbeitgeber – im Sinne der Erfüllung seiner Pflichten als Arbeitgeber zur Ausgestaltung einer entsprechenden Organisation und zur Anwendung einer derartigen Technologie veranlasst, die das Leben, die körperliche Unversehrtheit der Arbeitnehmer, sowie die Sicherheit ihrer sonstigen Vermögenswerte garantiert.

Daneben kann auch der präventive Zweck angenommen werden, d.h. die Arbeitgeber haben größeren Wert auf die Vorbeugung von Unfällen und Erkrankungen zu legen.[3] Es ist nämlich von erheblicher Bedeutung, dass sich die Arbeitgeber dafür einsetzen, die erforderlichen Maßnahmen zwecks Vorbeugung der eventuellen Schadensereignissen zu treffen.

Im Folgenden werden die grundlegenden Voraussetzungen für die Haftung des Arbeitgebers für Schäden durch interpretierende Analyse der obigen Elemente erörtert. Als erstens werden das Bestehen des Arbeitsverhältnisses, sodann die Kausalität, schließlich die Elemente des Schadenseintrittes dargestellt. Das rechtswidrige Verhalten – als Haftungsvoraussetzung – ist im Falle des Arbeitgebers irrelevant, da der Arbeitgeber für jede mit dem Arbeitsverhältnis verbundene und einen Schaden verursachende Tätigkeit haftet, indem seine Haftung verschuldensunabhängig ist.

2.1. Das Arbeitsverhältnis

Gemäß § 166 ArbG haftet der Arbeitgeber für Schäden, die im Zusammenhang mit einem Unfall oder Erkrankung (Gesundheitsschädigung) seiner Arbeitnehmer eingetreten sind, falls der Schadenseintritt mit dem Arbeitsverhältnis in Verbindung steht.

[2] § 51 Abs. 4 ArbG.

[3] Stellungnahme Nr. 29 des arbeitsrechtlichen Kollegiums des Obersten Gerichtshofs.

Dementsprechend setzt die arbeitsrechtliche Haftung für Schäden grundsätzlich das Bestehen eines Arbeitsverhältnisses sowie einen Zusammenhang zwischen dem Schaden und dem Arbeitsverhältnis voraus. Das Bestehen des Arbeitsverhältnisses – als Voraussetzung – ist ein gemeinsames Tatbestandselement sowohl bei der Arbeitgeber-, als auch bei der Arbeitnehmerhaftung.

Hinsichtlich des Bestehens des Arbeitsverhältnisses ist diejenige Vorschrift des ArbG von Bedeutung, nach der der Tag des Beginns des Arbeitsverhältnisses in dem Arbeitsvertrag festzulegen ist. Mangels dessen gilt der auf den Abschluss des Arbeitsvertrages folgende Tag als Beginn des Arbeitsverhältnisses.[4] Der Tag des Beginns des Arbeitsverhältnisses ist aus dem Grunde von Bedeutung, weil sofern das Schadensereignis vor diesem Tag oder nach Beendigung des Arbeitsverhältnisses eintritt, so kann die Haftung des Arbeitgebers grundsätzlich nicht festgestellt werden. Allerdings ist es zu betonen, dass der Zeitpunkt der Schadenszufügung und der des Schadenseintrittes nicht unbedingt zusammenfallen und daher auch solche Situationen entstehen können, wo der Schaden während des Bestehens des Arbeitsverhältnisses verursacht wird, während das Schadensereignis erst später, eventuell nach der Beendigung des Arbeitsverhältnisses eintritt. In solchen Fällen stellt die zwischenzeitliche Beendigung des Arbeitsverhältnisses der Feststellung der Haftung des Arbeitgebers kein Hindernis dar.[5] Dementsprechend ist diejenige Frage relevant, wann der Schaden verursacht wurde.

[4] § 48 ArbG.

[5] Einen solchen Fall stellt z.B. dar, wenn die Symptome der Erkrankung erst nach der Beendigung des Arbeitsverhältnisses auftreten. Da die Schäden aus einem Schadensereignis bei dem Arbeitnehmer in unterschiedlichen Zeitpunkten eintreten können, hat die Gerichtspraxis das Institut der sog. „stufenweisen Verjährung“ entwickelt. Dementsprechend verjähren die aus dem gleichen Schadensereignis stammenden unterschiedlichen Schäden (Einkommensverlust) selbstständig, d.h. die eventuelle Versäumung der Geltendmachung eines früher fälligen Anspruchs hat keinen Einfluss auf die Durchsetzbarkeit des anderen Anspruchs.

Merkwürdig in der Rechtsliteratur ist die Frage, wie derjenige Fall zu qualifizieren ist, wenn z.B. der Arbeitnehmer einen wirksamen Arbeitsvertrag abgeschlossen hat, in dem der Arbeitseintritt vereinbart wurde, jedoch kam es nicht zum Arbeitseintritt und das Schadensereignis sodann am Tag des Arbeitseintrittes während der Vorarbeiten oder der vorbereitenden Tätigkeiten eintritt. In diesem Fall ist es offensichtlich, dass das Schadensereignis im Zusammenhang mit der Arbeitsverhältnis eintritt, da mangels Arbeitsverhältnisses keine vorbereitenden Tätigkeiten verrichtet worden wären. Dennoch kam es nicht zum Arbeitseintritt und somit besteht theoretisch auch kein Arbeitsverhältnis. Sollte der Tag des Abschlusses des Arbeitsvertrags und der des Arbeitseintrittes nicht zusammenfallen, so kann die Haftung des Arbeitgebers für Schäden im Zeitraum zwischen dem Vertragsabschluss und dem Arbeitseintritt dann festgestellt werden, wenn der Schaden bei dem Arbeitnehmer während seiner Tätigkeit im Interesse der Förderung des Arbeitseintrittes eingetreten ist.[6] Ansonsten haftet der Arbeitgeber für die vor dem Arbeitseintritt eingetretenen Schäden gemäß den entsprechenden Vorschriften des bürgerlichen Rechtes.

Darüber hinaus ist es aus Sicht der Beurteilung von keiner Bedeutung, ob es um eine Haupt- oder Nebenerwerbstätigkeit, bzw. um eine Voll- oder Teilzeitarbeit geht. Gleichermaßen kann festgestellt werden, dass der zivilrechtliche Scheinvertrag auch zum wirksamen Entstehen eines Arbeitsverhältnisses führen kann.

Ebenfalls ist die Frage von grundlegender Bedeutung, bei wem die Beweislast im Falle der Haftung für Schäden liegt, da der Zusammenhang mit dem Arbeitsverhältnis eine Frage der Beweisführung ist. Nach den allgemeinen Regeln wird die Beweislast unter gemeinsamer Berücksichtigung des ung. BGB und des ArbG so gestaltet, dass der Arbeitnehmer zu beweisen hat, dass der Schaden bei ihm im Zusammenhang mit seinem Arbeitsverhältnis eingetreten ist, sowie dass der Schaden eingetreten ist – d.h. er wurde geschädigt –, während der Arbeitgeber von der Haftung befreit werden kann,

[6] LEHOCZKYNÉ KOLLONAY, CSILLA: *A magyar munkajog II.* [Das ungarische Arbeitsrecht II.], 1998, Kulturtrade Verlag, Budapest, 70.

falls er sich erfolgreich auf eine der Befreiungsgründe beruft. Anstatt des relevanten Grundes des Schadens ist in der Regel hinreichend, den Zusammenhang mit dem Arbeitsverhältnis zu beweisen. Diese Regel ist aus dem Grunde wichtig, weil diese die Vermutung begründet, dass das Schadensereignis in Verbindung mit dem Arbeitsverhältnis entstanden ist.[7] Diese Lösung überwindet auch den Beweisnotfall des Arbeitnehmers als der schwächeren Partei. Davon bildet lediglich die rechtliche Beurteilung sonstiger Erkrankungen eine Ausnahme, wo die Beweislast in Bezug auf die relevante Kausalität bei dem Arbeitnehmer liegt. Der Arbeitnehmer hat den Zusammenhang der Schädigung mit dem Arbeitsverhältnis mindestens nachweislich zu machen.[8] In dem Fall ferner, wenn der Arbeitgeber seine Haftung für Schaden wegen Betriebsunfall anerkannt hat, erstreckt sich diese bei dem Bestehen der Kausalität auch auf den Betrag des Krankengeldes, stehe es dem Arbeitnehmer wegen mit dem Betriebsunfall verbundener Erwerbsunfähigkeit oder wegen arbeitsbezogener, später aufgetretener Erkrankung zu.[9] In der Praxis ist es oftmals schwierig, Grenzlinien zwischen den mit dem Arbeitsverhältnis zusammenhängenden und nicht zusammenhängenden Schadensereignissen zu ziehen. Die Kausalität ist aufgrund der gemeinsamen Bewertung sämtlicher wesentlichen Umstände festzustellen.[10]

Zusammenfassend lässt sich also sagen, dass der Zusammenhang der Schadensverursachung mit dem Arbeitsverhältnis weit auszulegen ist, so umfasst dies sämtliche Abschnitte des Arbeitsverhältnisses von der Errichtung des Arbeitsverhältnisses ganz bis zu dessen Auflösung, und ggf. kann sich auch auf die vor dem Arbeitsantritt, d.h. vor dem Arbeitsbeginn verursachten Schäden erstrecken.

[7] GYULAVÁRI, TAMÁS (Hg.): *Munkajog* [Arbeitsrecht], 2013, ELTE Eötvös, Budapest, 379.
[8] Urteil des ung. Obersten Gerichtshofes Nr. BH2007.23.
[9] Urteil des ung. Obersten Gerichtshofes Nr. EBH2008.1802.
[10] Urteil des ung. Obersten Gerichtshofes Nr. BH2006.228.

2.2. Kausalität

Über das Bestehen des Arbeitsverhältnisses hinaus setzt die Haftung voraus, dass das Schadensereignis im Kausalzusammenhang mit dem Arbeitsverhältnis erfolgt. Dieser Kausalzusammenhang kann nicht nur ein unmittelbarer sondern auch ein mittelbarer Zusammenhang sein.[11] Das zweite Element ist also der (kausale) Zusammenhang mit dem Arbeitsverhältnis. Bereits in dieser Hinsicht gibt es einen Unterschied zwischen den für den Arbeitnehmer und den Arbeitgeber maßgebenden Regelungen, weil während der Arbeitgeber für den im Zusammenhang mit dem Arbeitsverhältnis eingetretenen Schaden haftet, so wird die Haftung des Arbeitnehmers bei der schuldigen Verletzung seiner aus dem Arbeitsverhältnis stammenden Verpflichtung festgestellt. Dabei ist es festzustellen, dass die Haftung des Arbeitgebers auch hier eine engere Kategorie bedeutet, weil die Schadensverursachung im Zusammenhang mit dem Arbeitsverhältnis praktisch sämtliche im Rahmen des Arbeitsverhältnisses eingetretenen Schäden umfasst (sofern keine Befreiungsgründe bestehen), gegenüber der Haftung des Arbeitnehmers, bei dem die Haftung nur im Falle einer schuldigen Pflichtverletzung festzustellen ist.

Der Begriff „im Zusammenhang mit dem Arbeitsverhältnis" umfasst also – gemäß der Stellungnahme Nr. 29 des arbeitsrechtlichen Kollegiums des Obersten Gerichtshofs – im Falle des Arbeitgebers nicht nur die tatsächliche Arbeitsverrichtung, sondern auch die sog. vorbereitende Arbeitsverrichtung vor dem Arbeitsbeginn, sowie das Schadensereignis, das während der Tätigkeiten im Zusammenhang mit den persönlichen Bedürfnissen (Essen, Umkleidung, Körperpflege) eintritt. Es ist oft der Fall, dass der Arbeitnehmer während der Fahrt zur Arbeitsstelle oder von dort nach Hause einen Unfall erleidet. Für die sich daraus ergebenden Schäden haftet der Arbeitgeber lediglich dann, wenn der Schaden während der Beförderung mit einem durch den Arbeitgeber betriebenen (bzw. mit

[11] Urteil des ung. Obersten Gerichtshofes Nr. BH2005.443.

dessen eigenen) Fahrzeug eintritt.[12] Der Zusammenhang des Unfalls mit dem Arbeitsverhältnis ist aufgrund der gemeinsamen Bewertung sämtlicher wesentlicher Beweismittel zu bestimmen.[13]

Aufgrund der früheren Regelung gehörten nach der Gerichtspraxis zu den im Zusammenhang mit dem Arbeitsverhältnis entstandenen Schäden nicht nur diejenigen, die während der Durchführung der Arbeitsaufgaben eingetreten sind, sondern auch die Schäden, die während der nach objektiver Beurteilung im Interesse des Arbeitgebers ausgeübten Tätigkeiten eingetreten sind.[14] Dementsprechend wurde die Haftung auch dann erweitert, wenn der Arbeitnehmer durch eine Entsendung im Ausland oder an einer Fortbildung war. In diesem Fall hatte der Arbeitgeber zwar keinen Einfluss auf die ausländischen Umstände, dennoch hat der Arbeitnehmer im Interesse des Arbeitgebers daran teilgenommen, so war seine objektive Haftung für die zu dieser Zeit eingetretenen Schäden feststellbar.[15] Dabei ist hervorzuheben, dass meiner Meinung nach diese Praxis in Zukunft nicht nachhaltig wird, weil der Arbeitgeber gemäß der neuen Regelung von der Haftung befreit wird, wenn das Schadensereignis durch einen nicht unter seinen Kontrollbereich fallenden Umstand verursacht wurde, der nicht beseitigt werden konnte, bzw. nicht vorzusehen war. In diesem genannten Fall hatte der Arbeitgeber keinerlei Einfluss auf die ausländischen Umstände, so lagen diese vermutlich außerhalb seines Kontrollbereiches, weswegen er von der Haftung vermutlich befreit wird. Nach meinem Standpunkt kann die Haftung des Arbeitgebers auch des Weiteren festgestellt werden, wenn der Arbeitnehmer während der Körperpflege in der Dusche ausrutscht, oder wenn er nach

[12] In sonstigen Fällen gilt der Unfall als ein betrieblicher Verkehrsunfall gemäß den Rechtsvorschriften der Sozialversicherung.

[13] Urteil des ung. Obersten Gerichtshofes Nr. BH2006.228.

[14] ROMÁN, LÁSZLÓ: *A munkajog alapintézményei 3.* [Grundlegende Rechtsinstitute des Arbeitsrechtes 3.], 1997, Institutiones Juris, Pécs, 44.

[15] FÉZER, TAMÁS (Hg.): *A kártérítési jog magyarázata* [Kommentar zum Schadenersatzrecht], 2010, Complex, Budapest, 21.

Anweisung des Arbeitgebers an einer Sportveranstaltung teilnimmt und dabei verletzt wird.[16]

Der Kontrollbereich des Arbeitgebers beschränkt sich nicht auf die Niederlassung des Arbeitgebers; der Zusammenhang zwischen dem Arbeitsverhältnis und dem den Schaden verursachenden Umstand kann auch im Falle einer Arbeitsverrichtung außerhalb der Niederlassung bestehen. In diesem Fall kann allerdings der Arbeitgeber von der Haftung vermutlich erfolgreich befreit werden, wenn er beweist, dass der Schaden durch einen außerhalb seiner Kontrolle liegenden Umstand verursacht wurde.

Die Tätigkeit des Arbeitnehmers, die er zwar an seiner Arbeitsstelle, jedoch zu seiner Privatzwecken verrichtet und die nicht zu seinen Arbeitsaufgaben gehört, kann nicht als eine „im Zusammenhang mit dem Arbeitsverhältnis stehende" Tätigkeit betrachtet werden.[17] Auch dann besteht keinen Zusammenhang mit dem Arbeitsverhältnis, wenn die Schäden in einem Arbeiterwohnheim eintreten.[18] Anschließend begründet auch das während der Ausübung einer nicht genehmigten nebenberuflichen Tätigkeit („Gestümper") eingetretene Schadensereignis nicht die Haftung des Arbeitgebers.[19]

Ebenfalls im Bereich der Kausalität stellt sich die Frage, wie die bereits bestehenden Gesundheitsschäden des Arbeitnehmers, die unabhängig von dem erlittenen Unfall sind, berücksichtigt werden sollen. Gemäß Stellungnahme Nr. 30 des arbeitsrechtlichen Kollegiums des Obersten Gerichtshofes: „wenn der Gesundheitszustand, die Körperbehinderung und die körperlichen Gegebenheiten des Arbeitnehmers nicht zur Erwerbsfähigkeitsverminderung mit Lohnverlust geführt haben, und der Lohnverlust des Arbeitnehmers auf die im Zusammenhang mit dem Arbeitsverhältnis eingetretene Verletzung seines Lebens, seines Gesundheitszustandes oder seiner Gesundheit zurückzuführen ist, haftet der Arbeitgeber gemäß § 174

[16] Urteil des ung. Obersten Gerichtshofes Nr. BH2005.368.
[17] Urteil des ung. Obersten Gerichtshofes Nr. MFV.I.10 804/2000/3.
[18] Urteil des ung. Obersten Gerichtshofes Nr. BH1993.263.
[19] Urteil des ung. Obersten Gerichtshofes Nr. BH2002.331.

des alten ArbG (aus dem Jahre 1992) für den vollen Schaden unabhängig von dem Prozentsatz der sich aus der genannten Verletzung ergebenden Erwerbsfähigkeitsverminderung des Arbeitnehmers." Dementsprechend beeinflusst die natürliche Erwerbsfähigkeitsverminderung weder die Kausalität noch die Höhe des Schadenersatzes, ferner liegt diese grundsätzlich auch nicht der Teilkausalität zugrunde. Ausgenommen hiervon ist der Fall, wenn die natürliche Gesundheitsschädigung den Arbeitnehmer bereits von vornherein – auch vor dem Eintritt des Schadensereignisses – bei der Erfüllung seines Arbeitsbereiches beschränkt hat.[20]

Zusammenfassend lässt sich also feststellen, dass der Ausdruck „im Zusammenhang mit dem Arbeitsverhältnis" nicht eindeutig einen genau begrenzten oder begrenzbaren Bereich bedeutet, sondern diese Bedingung kann im Falle der während dem Bestehen des Arbeitsverhältnisses eingetretenen Schäden quasi irgendwann erfüllt werden.

2.3. Schadenseintritt

Der Schaden ist ein in Geld ausdrückbarer materieller, bzw. immaterieller Nachteil, der im Vermögen des Geschädigten eine Wertverminderung bedeutet, oder seine Lebensführung, bzw. seine Persönlichkeitsrechte verletzt. Dementsprechend kann der Schaden materiell oder immateriell sein. Wie früher dargestellt, wird die Haftung des Arbeitgebers für Schäden wesentlich strenger geregelt, als die seiner Arbeitnehmer, und der Arbeitgeber ist verpflichtet, nicht nur die eingetretenen Sachschäden, sondern auch den Einkommensverlust – in erster Linie bei einer Gesundheits-schädigung –, die als sonstigen Schäden abzurechnenden Kosten, die Schäden der Angehörigen, den Betrag sonstiger regelmäßiger Einkommen außerhalb des Arbeitsverhältnisses und den immateriellen Schaden zu erstatten. Dabei ist zu betonen, dass dies nicht mehr zu den Voraussetzungen der Haftung gehört, sondern viel mehr zu

[20] PÁL, LAJOS – LŐRINCZ, GYÖRGY – KOZMA, ANNA – PETHŐ, RÓBERT: *Az új Munka Törvénykönyvének magyarázata* [Kommentar zum neuen Arbeitsgesetzbuch], 2012, HVG-ORAC, Budapest, 263.

deren Umfang. Voraussetzung für die Haftung ist also der Eintritt des tatsächlichen Schadens.

Der immaterielle Schaden stammt aus der unmittelbaren oder mittelbaren Verhinderung der Verwirklichung, bzw. Geltendmachung einzelner Persönlichkeitswerte, d.h. der Nachteil erscheint nicht in dem Vermögen des Geschädigten, sondern in seinen Persönlichkeitsrechten, bzw. Persönlichkeitswerten.[21] Obwohl die arbeitsrechtlichen Vorschriften die Geltendmachung von immateriellen Schäden erst ab dem 1. Januar 1980 ermöglicht haben, hat das Verfassungsgericht – bezugnehmend auf seinen Beschluss Nr. 12/1991. (IV.11), nach dem das Schadenersatzsystem aus dem Gerichtspunkt des Geschädigten als ein einheitliches System betrachtet werden müsse – den Zeitpunkt der Anwendbarkeit des immateriellen Schadenersatzes – übereinstimmend mit den Regelungen des BGB – auf den 1. März 1978 gesetzt.[22] Daneben möchte ich auf den Zusammenhang des Arbeitsverhältnisses, die Kausalität und den immateriellen Schaden auch hinweisen, nach dem: der immaterielle Schadenersatz dem Arbeitnehmer in dem Fall zusteht, wenn er solche Tatsachen beweist, aufgrund deren die immaterielle Schädigung des Arbeitnehmers im Kausalzusammenhang mit dem Verhalten des Arbeitgebers festgestellt werden kann.

3. AUSNAHMEN VON DER VERSCHULDENSUNABHÄNGIGEN HAFTUNG

Von den gesetzlich bestimmten strengen Haftungsvorschriften gibt es in gewissen Fällen und in einem vom Gesetz vorgesehenen, sowie durch die Gerichtspraxis entwickelten engen Bereich einige

[21] FERENCZ, JÁCINT: Kár érte? A munkáltatói kárfelelősség változása [Schaden erlitten? Änderungen in der Arbeitgeberhaftung für Schäden], in VEREBÉLYI, IMRE (Hg.): *Az állam és jog alapvető értékei a változó világban*, 2012, Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 227.
[22] LEHOCZKYNÉ KOLLONAY: *op. cit.* 72.

Ausnahmen. Der Gesetzgeber will die Arbeitgeber in diesen Ausnahmefällen nicht von der Haftung befreien, sondern ermöglicht die Minderung der verschuldensunabhängigen Haftung. In diesem Teil des Artikels werde ich als erstens die Regelung des alten ArbG von 1992 mit der des neuen ArbG in Hinsicht auf die Haftung für die in den Betrieb eingebrachten Sachen vergleichen. Während dieser Analyse werde ich auch die fortlebende Gerichtspraxis unter die Lupe nehmen. In dem zweiten Teil dieses Kapitals werde ich die besonderen Haftungsvorschriften des alten ArbG von 1992 in Bezug auf die Arbeitgeber mit begrenzten Finanzmitteln erläutern. Ich halte die Erörterung dieser letzteren, heutzutage bereits historischen Regelung für wichtig, weil nach meinem Standpunkt die in dem neuen ArbG vorgesehene Regelung, nach der „das Gericht den Arbeitgeber aufgrund von besonders zu berücksichtigenden Umständen teilweise vom Schadenersatz befreien kann“, die Manifestation des auf einen ähnlichen Zweck gerichteten Gesetzgeberwillens darstellt.

3.1. In den in den betrieb eingebrachten Sachen eingetretenen schaden

Die Haftung des Arbeitgebers war vor 1992 in Hinsicht auf die in den Betrieb eingebrachten Sachen nur dann verschuldensunabhängig, wenn der Schaden in den im Umkleideraum oder Schließfach des Arbeitgebers oder an einem durch ihn bestimmten Ort angelegten Sachen eingetreten war, ferner falls solche Kleidungsstücke oder persönliche Ausröstungsgegenstände geschädigt wurden, die der Arbeitnehmer auch während der Arbeitsverrichtung regelmäßig bei sich gehalten hat, sowie falls der Schaden bei einem solchen Unfall eingetreten war, für den der Arbeitgeber zu haften hatte.[23] Es kann also eindeutig festgestellt werden, dass die Regelung, die die Haftung des Arbeitgebers für Schäden, die in den in den Betrieb eingebrachten Sachen des Arbeitnehmers eingetretenen sind als

[23] KISS, GYÖRGY: *Munkajog* [Arbeitsrecht], 2005, Osiris, Budapest, 284.

verschuldensunabhängig erklärt hat, hat sowohl die Regelung als auch die Rechtsanwendung deutlich vereinfacht.[24]

Gemäß ArbG hat der Arbeitgeber zwar verschuldensunabhängig zu haften, jedoch um dies zuvorzukommen, kann er vorschreiben, dass die Arbeitnehmer die in den Betrieb eingebrachten Sachen in einem Schließfach unterbringen oder diese anmelden müssen. Die zur Fahrt zur Arbeit oder zur Arbeitsverrichtung nicht benötigten Sachen können nur mit der Genehmigung des Arbeitgebers eingebracht werden.[25] Sofern der Arbeitgeber die Unterbringung der Sachen in einem Schließfach oder deren Anmeldung vorschreibt und der Arbeitnehmer diese Vorschriften verletzt, haftet der Arbeitgeber nur für die vorsätzliche Schadenszufügung. Dementsprechend ist die Befreiung des Arbeitnehmers von der Haftung möglich, aber nur in dem Fall, wenn er beweist, dass der Arbeitnehmer die auf die Unterbringung (Bewahrung) oder auf die Anmeldung der Sachen maßgebenden Vorschriften verletzt hat.[26]

Eine bedeutende Änderung im Vergleich zum alten ArbG von 1992 ist unbedingt zu hervorzuheben, weil diese sogar auch die Modifizierung der Stellungnahme Nr. 22 des arbeitsrechtlichen Kollegiums des Obersten Gerichtshofs zur Folge haben kann. Gemäß ArbG können die zur Fahrt zur Arbeit oder zur Arbeitsverrichtung nicht benötigten Sachen nur mit der Genehmigung des Arbeitgebers in den Betrieb eingebracht werden.[27] Diese von den früheren Regelung abweichende Vorschrift untersagt von Gesetzes wegen, dass der Arbeitnehmer freiwillig zur Arbeitsverrichtung unnötige Sachen bei sich hält. In diesem Fall liegt es also im eigenen Ermessen des Arbeitgebers, ob er die Einbringung der Sachen in den Betrieb erlaubt oder nicht.[28] Sofern der Arbeitgeber die Genehmigung nicht erteilt, und der Arbeitnehmer die Sache trotzdem in den

[24] § 176 Abs. 1 und 2 des alten ArbG von 1992 und § 168 Abs, 1 und 2.
[25] § 168 Abs. 2 ArbG.
[26] Urteil des ung. Obersten Gerichtshofes Nr. BH1997.502.
[27] § 168 Abs. 2 ArbG.
[28] Dies kann natürlich auch nicht unbegrenzt sein, weil die Anforderung der bestimmungsgemäßen Rechtsausübung auch hier als eine Grenze gilt.

Betrieb einbringt, und diese dort geschädigt wird, haftet der Arbeitgeber nur dann, wenn der Arbeitnehmer beweist, dass die Schadenverursachung vorsätzlich war. Bei Ausübung dieses Rechtes des Arbeitgebers gilt ausschließlich die Erfüllung der Anforderung der bestimmungsgemäßen Rechtsausübung als eine Schranke.

Im Falle eines Schadens in Sachen, die in eine kulturelle, Sport- oder sonstige Veranstaltung der Arbeitnehmer oder einer Gruppe der Arbeitnehmer eingebracht wurden, seien sie Eigentum der Arbeitnehmer oder des Arbeitgebers, hängt die Bestimmung der für die Schadenshaftung des Arbeitgebers maßgebenden Rechtsvorschrift davon ab, ob die Schadensverursachung mit dem Arbeitsverhältnis verbunden war.[29] In der arbeitsrechtlichen Rechtspraxis gab es lange keine einheitliche Beurteilung in Bezug auf die Frage, welche materiell-rechtliche Rechtsvorschrift für den Ersatz des Schadens an Sachen maßgebend ist, die in eine kulturelle, Sport- oder sonstige Veranstaltung der Arbeitnehmer oder einer Gruppe der Arbeitnehmer eingebracht wurden, seien sie Eigentum der Arbeitnehmer oder des Arbeitgebers. Sofern keine der oben genannten Veranstaltungen unter den Begriff Arbeitsverhältnis fällt, so sind die Regelungen des ArbG über die Arbeitgeberhaftung für Schäden auf die Geltendmachung der Schadenersatzpflicht aus dem erfolgten Schadensereignis auch dann nicht anwendbar, wenn der Schaden durch den einen Arbeitnehmer des Arbeitgebers verursacht wurde. Ebenfalls können die Vorschriften des Arbeitsrechtes auch in dem Falle nicht angewendet werden, wenn der Schadensverursacher eine Person ist, die an der Veranstaltung teilgenommen hat, aber mit dem Arbeitgeber nicht im Arbeitsverhältnis steht.

Es können auch solche Fälle geben, wenn der an der Veranstaltung teilnehmende, das Gebiet des Arbeitgebers betretene Arbeitnehmer einen Sachschaden in der Weise erleidet, dass das Schadensereignis in irgendeiner Form im Zusammenhang mit dem

[29] Stellungnahme Nr. 22 des arbeitsrechtlichen Kollegiums des Obersten Gerichtshofs.

Arbeitsverhältnis eingetreten ist.[30] In diesem Fall ist der Schaden im Zusammenhang mit dem Arbeitsverhältnis entstanden, für den die Haftung des Arbeitgebers schon festzustellen ist. Ähnlich zu diesem Fall sind die Vorschriften des ArbG über die Schadenersatzpflicht gegenüber dem Arbeitnehmer anzuwenden, wenn der Arbeitnehmer den Schaden zwar im Zusammenhang mit der Veranstaltung verursacht hat, an der Veranstaltung hat er aber nach Anweisung des Arbeitgebers d.h. im Zusammenhang mit seinem Arbeitsverhältnis teilgenommen. Sofern der Arbeitnehmer den Schaden nicht in dieser Eigenschaft verursacht hat, sind die Vorschriften des ung. BGB über Haftung für außervertraglich verursachten Schäden maßgebend.

Darüber hinaus – vermutlich auch gemäß der neuen Rechtspraxis – hat auch der Arbeitnehmer für seine eigenen in den Betrieb eingebrachten Sachen Sorge zu tragen. Bei Versäumen dieser Sorgepflicht ist die Haftung des Arbeitgebers nicht festzustellen.[31] Dies ist dann von Bedeutung, wenn die Sache nicht ausdrücklich mit der Arbeitsverrichtung verbunden ist, am Arbeitsplatz kein Schließfach zu finden ist, und der Arbeitgeber keine die Einbringung von eigenen Sachen beschränkenden oder verbietenden Vorschriften erlassen hat.

3.2. Arbeitgeber mit begrenzten Finanzmitteln

Im alten Arbeitsgesetzbuch von 1992 wurde im Bereich der Haftungsregelung bis zum 1. Januar 2010 ein Unterschied unter den Arbeitgebern aufgrund ihrer Leistungsfähigkeit gemacht. Demnach hat der Arbeitgeber, der als Privatperson weniger als zehn Arbeitnehmer in Haupttätigkeit beschäftigt hat, für die dem

[30] Z.B. wenn der Pförtner des Arbeitgebers während der Veranstaltung den Schlüssel des Arbeitnehmers ausgibt, und danach der dort aufgehängte Mantel des Arbeitnehmers aus seinem Zimmer gestohlen wird oder wenn die persönlichen Vermögensgegenstände der Arbeitnehmer in den durch den Arbeitgeber auch zu dieser Zeit zu bewachenden Umkleideräumen angelegt, und von dort gestohlen werden.

[31] Urteil des ung. Obersten Gerichtshofes Nr. BH1981.209.

Arbeitnehmer zugefügten Schäden – abweichend von den allgemeinen Regeln – beim Verschulden gehaftet.[32]

Grund für die spezielle Regelung war, dass die geringeren Ressourcen und Organisation der Arbeitgeber mit begrenzten Finanzmitteln die Anwendung der grundsätzlich strengen verschuldensunabhängigen Haftung nicht ermöglicht haben.[33] Es ist jedoch zu betonen, dass trotz der Obigen diese Regelung selbstverständlich nicht zur Folge hatte, dass diese Arbeitgeber weniger an den Arbeitsschutz- und Sicherheitsvorschriften gebunden gewesen waren.

Die Anwendung der leichteren Haftungsregelungen für Arbeitgeber mit begrenzten Finanzmitteln war durch zwei Kriterien bedingt. Einerseits ist hervorzuheben, dass sich diese Begünstigung ausschließlich auf Privatpersonen, und auf keine Wirtschaftsgesellschaften oder sonstigen wirtschaftlichen Organisationen mit Rechtspersönlichkeit in Arbeitgeberposition bezogen hat. Andererseits war die Anzahl des beschäftigten Personalbestandes auf zehn beschränkt, wobei die Voraussetzung bezüglich dieser Zahlangabe auch zum Zeitpunkt der Schadenszufügung erfüllt werden musste.

Was die Beweisführung angeht, waren der Schadenseintritt und dessen Zusammenhang mit dem Arbeitsverhältnis gemäß den allgemeinen Regeln durch den Arbeitnehmer zu beweisen, während der Arbeitgeber dagegen beweisen konnte, dass er so vorgegangen ist, wie im gegebenen Fall allgemein erwartet.[34] Der Arbeitgeber konnte sich von der Haftung ausschließlich dann befreien, wenn er den Mangel seines Verschuldens erfolgreich bewiesen hat, da das Verschulden des Arbeitgebers vermutet wurde.

György Kiss hat diese Regel an mehreren Stellen für problematisch erklärt. Nach seinem Standpunkt sei die Regel sowohl aus rechtsdogmatischer als auch aus rechtspolitischer Sicht strittig gewesen. Kiss betonte, dass in der Praxis gerade die größeren

[32] § 175 Abs. 1 des alten ArbG von 1992.
[33] PÁL, LAJOS – RADNAY, JÓZSEF – TALLIÁN, BLANKA: *Munkajogi Kézikönyv* [Handbuch für Arbeitsrecht], 2007, HVG-ORAC, Budapest, 306.
[34] § 175 Abs. 2 des alten ArbG von 1992.

Arbeitgeber sind diejenigen, die für die Schaffung einer gesunden und sicheren Arbeitsverrichtung effektiver und exakter Sorge tragen. Dementsprechend reduziert diese Regel die Haftung gerade derjenigen Arbeitgeber, bei denen der Schaden mit höherer Wahrscheinlichkeit eintreten wird. Ferner hat er bedauert, dass selbst die Tatsache, dass die Arbeitgeber mit begrenzten Finanzmitteln weniger Arbeitnehmer beschäftigen, kann die Minderung der Haftung nicht rechtfertigen. Schließlich hat Kiss auch auf einen Konstruktionsfehler hingewiesen. Nach dem alten Arbeitsgesetzbuch kann nämlich als Arbeitgeber nur eine rechtsfähige Person fungieren. Durch diese Voraussetzung wird die Anwendung des Ausdruckes „Arbeitgeber, als Privatperson" unbegründet, da es im Sinne des Gesetzes keinen rechtlichen Grund für die Differenzierung hinsichtlich ihrer Rechtslage gibt.[35] Die Regelung war also an mehreren Stellen kritisiert, bevor das Verfassungsgericht die Bestimmung mit Wirkung vom 31. Dezember 2009 aufgehoben hat.[36]

[35] KISS: *op. cit*. 281.

[36] Beschluss des Verfassungsgerichtes Nr. 41 von 2009 (27. März): In seiner Begründung hat das Verfassungsgericht erst dazu Stellung genommen, ob die in § 174 des alten ArbG erwähnten Arbeitgeber mit denjenigen Arbeitgebern als Privatperson verglichen werden können, die (gemäß § 175 des alten ArbG) höchstens zehn Arbeitnehmer in Haupttätigkeit beschäftigen, bzw. ob einen Unterschied zwischen Arbeitgebern als Privatperson und denen als nicht Privatperson gibt. Nach Standpunkt des Verfassungsgerichtes gab es keinen vernünftigen Grund dafür, warum die Regelung über die Verschuldenshaftung gerade auf diese Arbeitgeber angewendet werden sollte. Aufgrund des Obigen hat das Verfassungsgericht festgestellt, dass die Differenzierung zwischen den Arbeitgeberhaftungsmodellen aufgrund der rechtlichen Form und der Anzahl des in Haupttätigkeit beschäftigten Personals i.H. v. zehn nicht auf einem vernünftigen verfassungsrechtlichen Grund beruht. Gemäß Antrag hat das Verfassungsgericht sodann auch untersucht, ob die Regelungen in § 175 des alten ArbG über die Verschuldenshaftung des Arbeitgebers diskriminierend für diejenigen Arbeitnehmer waren, die von einem Arbeitgeber als Privatperson mit höchstens zehn Arbeitnehmern in

In den letzten Jahren gab es zur Anwendung dieser Regelung keine Möglichkeit mehr, da das Verfassungsgericht diese Vorschrift des alten Arbeitsgesetzbuches aufgehoben hat. Die Tatsache, dass diese Regelung Gegenstand meiner Forschungen ist, ist auf einen sehr wichtigen Grund zurückzuführen. Ich bin teilweise mit der Kritik von György Kiss einverstanden, und zwar damit, dass eine derartige Differenzierung zwischen den Arbeitgebern auch damit nicht begründet ist, dass zahlreiche EU Richtlinien unter ihren Grundprinzipien deklarieren, dass bei der Umsetzung der einzelnen Rechtsnormen der Europäischen Gesellschaft darauf geachtet werden soll, die Tätigkeit der Klein- und Mittelunternehmen dadurch nicht unmöglich zu machen, bzw. nicht zu erschweren. Es ist hingegen offensichtlich, dass die meisten Privatpersonen nicht über das erforderliche Finanzmittel zur Gründung eines Großunternehmens verfügen. Nach meinem Standpunkt wäre anlässlich dieser Unterschiede erforderlich, im Falle dieser Arbeitgeber gewissermaßen angemessen – vorzugehen. Die Rechtsprechung kann Klein- und Großunternehmen nicht gleich behandeln und auch nach der Formallogik kann es kaum erwartet werden, dass Klein- und Großunternehmen im Bereich der Schadensvorbeugung mit gleicher Effektivität vorgehen. Diesen gesetzgeberischen Willen wiederspiegelt die Regelung in dem neuen Arbeitsgesetzbuch, welche als Novum zu betrachten ist und nach welcher das Gericht den Arbeitgeber bei Vorliegen von berücksichtigungswürdigen Umständen von der Schadenersatzpflicht teilweise befreien kann.[37] Dabei sind insbesondere die finanzielle Lage der Parteien, die Schwere der Rechtsverletzung und die Folgen der Erfüllung der Schadenersatzpflicht in Betracht zu ziehen.

Haupttätigkeit beschäftigt waren. Dabei hat das Verfassungsgericht festgehalten, dass der Schutz der wirtschaftlichen und finanziellen Interessen der Arbeitgeber die Differenzierung zwischen den Arbeitgebern als Privatperson mit höchstens zehn Arbeitnehmern in Haupttätigkeit und den anderen Arbeitgebern - aufgrund der Anzahl der in Haupttätigkeit beschäftigten Personals - aus verfassungsrechtlicher Sicht nicht rechtfertigt.

[37] § 167 Abs. 3 ArbG.

Auch der Kommentar zu dem Gesetz bestätigt die Auslegung gemäß dem gesetzgeberischen Willen, der betont, dass diese Regelung vor allem bei solchen Arbeitgebern mit begrenzten Finanzmitteln (insbesondere bei natürlichen Personen) angewendet werden kann, bei welchen ein hoher Schadenersatzbetrag die Aufrechterhaltung des Betriebes, bzw. – im Falle von natürlichen Personen – ihres Lebensunterhaltes unbegründet gefährden würde.[38] Aufgrund dessen kann also festgestellt werden, dass diese Arbeitgebergruppe nicht mehr als ein Ausnahmefall von der Hauptregel, also der verschuldensunabhängigen Haftung betrachtet werden kann, jedoch kann der in der früheren Regelung erkennbare gesetzgeberische Willen sein Ziel in Zukunft durch die Gerichtspraxis erreichen.

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[38] Allgemeiner Kommentar zu §§ 166-167 ArbG.

[7] PÁL, LAJOS – LŐRINCZ, GYÖRGY – KOZMA, ANNA – PETHŐ, RÓBERT: *Az új Munka Törvénykönyvének magyarázata* [Kommentar zum neuen Arbeitsgesetzbuch], 2012, HVG-ORAC, Budapest.
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Lilla VULCZ

The International Development Cooperation by EU with Special Regard to Hungary

1. INTRODUCTION

Among the global problems of the 21st century, there is a significant one, which is the issue of the developing countries. The developing world as a definition firstly appeared in common after World War II, within the decolonization period.[1] In the relation of the developing countries, this study refers to those ones which were liberated from the colonial and half colonial status, and whose backwardness can be traced back to their peripheral and dependent place in the economy, having weak, unequal relationships or not having any relationship with developed countries due to colonization. This system is described in the world-system theory as a center-half periphery or even a center-periphery contact.[2]

Among countries of the developing world (according to commercial and development policy of the EU), more developed countries such as Argentina, Mexico, India and more underdeveloped ones like ACP countries (ACP being an English abbreviation of the

[1] *See* HAGGARD, STEPHAN: *Developing Nations and the Politics of Global Integration*, 1995, Brookings Institution Press, Washington and LEYS, COLIN: *Politics and Change in Developing Countries*, 2011, Cambridge University Press, Cambridge.

[2] SZIGETI, PÉTER: *Világrendszernézőben. Globális „szabad verseny" – a világkapitalizmus jelenlegi stádiuma* [Exploring World Systems. Global "open competition" – The Current Stage of World Capitalism], 2005, Napvilág Kiadó, Budapest, 52-53.

words African, Caribbean and Pacific) can be listed.[3] Of course, there is an essential difference among these counties regarding economic, social, welfare and religious fields.

There are many factors, which contribute to the poverty and backwardness of developing countries. Among the reasons of poverty, it is worth emphasizing the lack of employment opportunities, full or partial unemployment, lack of qualifications which closely joins them as well as functional illiterateness.[4] Other factors raising poverty are (1) conflicts among states, civil wars, their role in drug and arm commerce or international crime organizations,[5] and (2) the increasing number of natural disasters, therefore, bad state of the environment, (3) dramatically increasing number of population[6] in the third world and therefore (4) states' failures[7] as well as debt trap.

These above mentioned reasons together cause the disadvantageous state of developing countries; thus, it is essential that developed countries should intervene in improving their living standards, with their main objectives to reduce and eradicate poverty,

[3] KOLLER, INEZ – GRÜNTH, ZOLTÁN: *Az Európai Unió Fejlődő Országok Felé Irányuló Politikája* [The European Union's Policy in the Interest of the Developing Countries]. Available at: http://www.publikon.hu/application /essay/305_1.pdf [cit. 2013-10-07].

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[5] DEÁK, PÉTER (ed.): *Biztonságpolitikai kézikönyv* [Security Policy Handbook], 2007, Osiris, Budapest, 177-195.; DEÁK PÉTER*: Biztonságpolitika a hétköznapokban* [Security Policy in every days], 2009, Zrínyi kiadó, Budapest, 107-142.

[6] SIMAI, MIHÁLY*:* A szegénység globális problémái és a fejlesztési együttműködés [The Global Problems of the Poverty and the International Development Cooperation], in GÖMBÖS, ERVIN: *A nemzetközi fejlesztési együttműködés a XXI. században* [International Development Cooperation in tne 21st Century], 2005, Magyar ENSZ Társaság, Hunida Kht., 151.

[7] DEÁK: *op. cit.* 195-197. *See* FUKUYAMA, FRANCIS: *Államépítés* [State Building], 2005, Századvég, Budapest, 8-9.

increase living conditions and standards, develop the level of education, healthcare and economy, and integrate these countries into a higher international economy. The problems of developing countries are global problems, as well, because the unequal connection between local and global markets is getting closer and closer and we need a worldwide cooperation to solve them due to the reciprocal dependence in the global economy.

The role of the European Union in helping the so-called third world is relatively significant, because the EU is a global character and has a significant economic power. More than the half of the aids[8] which are given to developing countries come from the Union and its member states. Among others, EuropeAid, the International Development Cooperation is the realization of this support.

2. INTERNATIONAL DEVELOPMENT COOPERATION PROGRAMME IN THE EUROPEAN UNION

2.1. Legal grounds of development cooperation

The development policy is a cardinal and important part of the European Union's foreign contacts. Since its establishment, the European Community has supported the development of the world's different regions, among them mainly developing countries.[9] According to the Treaty on the Functioning of the European Union (hereinafter: TFEU) Article 3 paragraph 5, the European Union contributes to the protection of the right of peace, security, sustainable development of the Earth, solidarity and reciprocal

[8] Európai Unió: Fejlesztési és együttműködési politika [The European Union: International Development Cooperation Policy], available at: http://europa.eu/pol/dev/index_hu.html [cit. 2013-06-04].

[9] ARMELLE, DOUAUD: *A fejlesztési politika általános áttekintése* [The Ordinary Survey of the Developing Policy], available at: http://circa.europa.eu/irc/opoce/fact_sheets/info/data/relations/general/article_7253_hu.htm [cit. 2013-06-04].

respect among nations, free and honest commerce, liquidation of poverty and human rights, especially rights of children.

Next to Articles 208-213 of the TFEU, the Agreement in Cotonou and different cooperation agreements (mainly with Asia and Latin-America), in Article 133 of the European Community Treaty on average preference system and cooperation agreement, it provides the legal ground of the development cooperation policy which can be found in Article 207 of TFEU.

Article 208 of the TFEU lays down that the policy of the Union's development cooperation should be carried out according to principles and goals of the Union's foreign activity and this is interlinked with the policy of member states' development cooperation. The main goal of the Union's development policy is to decrease and gradually eradicate poverty. Moreover, general goals of the TFEU's development policy provides three more obligations for the Union and its member states. Based on Article 208 paragraph 2 (1), the Union and its member states discharge those obligations and consider those goals which are accepted by the United Nations and other international organizations having competence within these fields. Here, two standard documents regarding the international development cooperation shall be mentioned: Millennium Development goals which were accepted in 2000 and Declaration of Aid efficiency accepted by OECD/DAC[10] in 2005 in Paris. According to Article 210 (2), the Union and its member states consult each other in the frame of international organizations and conferences, they harmonize the policy of development coordination, consult each other on their aid programs, they present it together and member states help realizing the Union's aid programs if it is necessary. The third obligation of the Union and its member states is in Article 211, establishing (3) that the Union and its member states cooperate with third countries and international organizations if they are entitled to do so.

To sum it up, it is worth highlighting that the Union's development policy has five fundamental principles: (1) the principle

[10] DAC: Development Assistance Committee.

of complementarity (the Union's activity has to complement the development programs of member states), (2) the principle of coordination (presentation of the Union and member countries has to be coordinated), (3) the principle of coherency (the goals of the development policy have to be integrated into other EU policies), (4) the principle of geographical weighting (priority of backward countries), as well as (5) the principle of political conditions (aids are bound to democratic governments).[11]

2.2. Millennium Development Goals

In 2000, member states of the United Nations and most of the international organizations engaged themselves in the realization of the Millennium Development Goals (MDGs) which were created by them. Signers of the declaration endorsed the basic worth in the United Nations Charter and with the help of approving defined steps they engaged themselves in eradicating global poverty and creating a livable world.[12] At the general meeting, member states launched 8 extensive goals which would have to be realized by 2015, with 18 partial goals and 48 indicators to realize the development and to be successful. The first 7 goals are about decreasing different forms of poverty, while the 8th goal is in connection with the tools of reaching the first seven ones.[13] The first among the Millennium Goals is (1) to stop serious poverty and starvation, so the goal of member states is to decrease the number of people by half who live on less than one dollar a day and suffer from starvation. Other goals are (2) realizing all-embracing basic education, (3) equality of genders and rise of women, (4) decreasing children mortality, (5) improving mothers' health care, (6) fighting against HIV/AIDS, malaria and other illnesses, (7) ensuring the sustainability of the environment and (8) building up global partnership in connection with the development. In the 8 main goals more partial goals and indicators were made up

[11] HORVÁTH, ZOLTÁN*: Kézikönyv az Európai Unióról* [Handbook on the European Union], 2007, HVG-ORAC Lap-és könyvkiadó, Budapest, 532.
[12] KONDOROSI: *op. cit.* 92.
[13] Ibid. 92.

such as decreasing children mortality by two thirds among children under 5, or stopping and turning back the spread of HIV/AIDS, malaria and other illnesses.[14]

In order to ensure the goals, the European Union engaged itself in the aids paid by the member states of the EU saying that it would reach 0.7% of the GNI in member state level by 2015, with the intermediate goal that it was 0.56% by 2010. This GNI grant is not obligatory for new members because there is a huge difference in its development in the EU 15 and the 13 new members. The standard grants for them are 0.17% by 2010 and 0.33% by 2015.[15] The set aims have not been fully realized. In 2011, 27 EU members gave 0.42 % of the GNI to charity, which is a decrease from the 0.44% in 2010 and it was also under the goals they set for the future. Hungary has improved from the fall in 2010. In 2011, the scale was 0.11 % GNI aid but Hungary did not manage to ensure the planned 0.17% GNI development support (similarly with many other EU member countries).

The data of 2012 is not final but according to estimations, it shall be stated that the 1% aiding was only realized by Luxemburg. Otherwise, Bulgaria, Romania, Latvia, Poland and Slovakia have not reached the 1% yet, while our estimated aiding is only 0.10 %.[16]

[14] Magyar ENSZ Társaság- Millenniumi Fejlesztési Célok [Hungarian UN Association: Millennium Development Goals], available at: http://www.menszt.hu/tudnivalok_az_egyesult_nemzetek_szervezeterol/millenniumi_fejlesztesi_celok [cit. 2013-06-04].

[15] HORVÁTH: *op. cit.* 349.

[16] Official development assistance as share of gross national income, available at: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table& init=1&plugin=1&language=en&pcode=tsdgp100 [cit. 2013-06-21].

geo	2004	2005	2006	2007	2008	2009	2010	2011	2012
EU (27 countries)	0.34	0.42	0.41	0.37	0.40	0.42	0.44	0.42	0.39(p)
Belgium	0.41	0.53	0.50	0.43	0.48	0.55	0.64	0.54	0.47(p)
Bulgaria	:	:	:	0.06	0.04	0.04	0.09	0.09	0.08(p)
Czech Republic	0.11	0.11	0.12	0.11	0.12	0.12	0.13	0.12	0.12(p)
Denmark	0.85	0.81	0.80	0.81	0.82	0.88	0.91	0.85	0.84(p)
Germany	0.28	0.36	0.36	0.37	0.38	0.35	0.39	0.39	0.38(p)
Estonia	0.05	0.08	0.09	0.08	0.10	0.10	0.10	0.11	0.11(p)
Ireland	0.39	0.42	0.54	0.55	0.59	0.54	0.52	0.51	0.48(p)
Greece	0.16	0.17	0.17	0.16	0.21	0.19	0.17	0.15	0.13(p)
Spain	0.24	0.27	0.32	0.37	0.45	0.46	0.43	0.29	0.15(p)
France	0.41	0.47	0.47	0.38	0.39	0.47	0.50	0.46	0.46(p)
Italy	0.15	0.29	0.20	0.19	0.22	0.16	0.15	0.20	0.13(p)
Cyprus	0.03	0.09	0.15	0.17	0.17	0.20	0.23	0.16	0.12(p)
Latvia	0.06	0.07	0.06	0.06	0.07	0.08	0.06	0.07	0.08(p)
Lithuania	0.04	0.06	0.08	0.11	0.11	0.11	0.10	0.13	0.13(p)
Luxem-bourg	0.79	0.79	0.89	0.92	0.97	1.04	1.05	0.97	1.00(p)
Hungary	0.07	0.11	0.13	0.08	0.08	0.10	0.09	0.11	0.10(p)
Malta	0.18	0.17	0.15	0.15	0.20	0.18	0.18	0.25	0.23(p)
Netherlands	0.73	0.82	0.81	0.81	0.80	0.82	0.81	0.75	0.71(p)
Austria	0.23	0.52	0.47	0.50	0.43	0.30	0.32	0.27	0.28(p)
Poland	0.05	0.07	0.09	0.10	0.08	0.09	0.08	0.08	0.09(p)
Portugal	0.63	0.21	0.21	0.22	0.27	0.23	0.29	0.31	0.27(p)
Romania	:	:	:	0.07	0.09	0.08	0.07	0.09	0.08(p)
Slovenia	0.10	0.11	0.12	0.12	0.13	0.15	0.13	0.13	0.13(p)
Slovakia	0.07	0.12	0.10	0.09	0.10	0.09	0.09	0.09	0.09(p)
Finland	0.37	0.46	0.40	0.39	0.44	0.54	0.55	0.53	0.53(p)
Sweden	0.78	0.94	1.02	0.93	0.98	1.12	0.97	1.02	0.99(p)
United Kingdom	0.36	0.47	0.51	0.36	0.43	0.51	0.57	0.56	0.56(p)
Iceland	0.18	0.18	0.27	0.27	0.47	0.35	0.29	0.21	0.22(p)
Norway	0.87	0.94	0.89	0.95	0.89	1.06	1.05	0.96	0.93(p)
Switzerland	0.39	0.42	0.38	0.37	0.42	0.44	0.39	0.45	0.45(p)
Turkey	0.11	0.17	0.18	0.09	0.11	0.11	0.13	0.16	0.33(p)
:= no data p=provisional									

2.3. International Development Cooperation's uncertain future

The Community's development policy will have to face with several serious challenges in the future. The problems in the field of aiding efficiency are conspicuous, which means that in certain developing countries it can be questioned if they really need aids from EU. These countries are, for example, China, India, Mexico, Brazil and other countries which have a rapidly developing economy. For example, China became the world's workshop in spite of the huge poverty in the last decades and that is why the number of indigents has been rapidly decreasing.[17] This causes the second problem: some developing countries have not only become partner countries but also donors in international politics. The hard thing in connection with China is caused by using a different development policy that is why its aids are built upon neither political nor other conditions and this helps some autocrat systems to live on. However, this practice is in opposition with the EU's development policy, which builds its aids upon democratic governments. Another problem is the Millennium Development Goals, which are the frames of the Union's development policy, only insists the member countries until 2015 and after that they lose their operation.[18] The number of member states' aiding willingness and opportunities decreased during the previous years due to the economic crisis; therefore, member states' aiding should be strengthened and increased in the future in order to keep the success of the international development cooperation.

[17] SZENT-IVÁNYI, BALÁZS: Az Európai Unió nemzetközi fejlesztési politikája előtt álló kihívások és válaszok [The Challenges and Answers the European Union's International Development Cooperation has to Face with], in *Köz-gazdaság*, Vol. 8. No. 1. (2013) 228-229.
[18] Ibid. 228-229.

3. HUNGARY AS MEMBER OF THE DONOR COMMUNITY

3.1. Development policy of Hungary

The European Union's international development policy was partly made final in 2000, in which principles of OECD[19] DAC, the Millennium Development Goals of the United Nation and international programmes of world conferences organized in this topic such as rounds in Doha, Montererrey and Johannesburg were set.

The problems in developing countries such as poverty and drug trade do not stay within their borders due to the effects of globalization. Our country is also at the mercy of these negative effects and having knowledge on this issue, Hungary also signed the Millennium Declaration of United Nations in 2000 with other members. Hungary, as member of the United Nations, OECD and the European Union, is intended to encourage developing countries, give humanitarian aid to disastrous places and decrease extreme poverty to a higher and higher degree.

Since it joined the EU, Hungary has had to use the total law of the EU on the development cooperation contained in Articles 208-213 of the EU Treaty as the part of *acquis communautaire*.[20] According to this, the EU's main goal is to fight against poverty, moreover, according to community law, Hungary not only has to pay into the community's budget but based on normativity, it also has to pay to EDF (European Development Found), which finances the activities of international development cooperation in ACP countries according to the Agreement in Contonou.[21] Hungary had to take a

[19] OECD: Organisation for Economic Co-operation and Development.

[20] A magyar nemzetközi fejlesztési együttműködési (NEFE) politika [The International Development Policy], available at: http://www.zpok.hu/img_upload/f880a7b608b6eaa8411125e501dc0547/Magyar_NEFE_Politika.doc [cit. 2013-10-07].

[21] Nemzetközi Fejlesztési Együttműködés: A globális problémák megoldásának hazai és nemzetközi szintje [International Development

long way to prepare for the donor role: develop the institution background and train suitable experts but it got help from CIDA (Canadian International Development Agency) and UNDP (United Nations Development Programme), as well.

In Hungary, the Ministry of Foreign Affairs is responsible for planning, coordinating and realizing the international development cooperation policy.[22] The government, which was introduced on 29 May 2010, has not changed the institutional background of the international development cooperation in spite of the reorganization in state administration, so these exercises belong to NEFEFO (International Development Cooperation and Humanitarian Aiding Department, which is one of the Ministry of Foreign Affairs' units).[23]

According to the practice of the Ministry of Foreign Affairs, it can be stated that partner countries are chosen by reason of strict and logical criteria because compared to foreign countries Hungarian Development Policy can only be supported by low financial means, so that is why Hungary should only choose a few countries as partner countries. The goal during the selection is that the chosen country has to be suitable for the cooperation terms of the donor community and international organizations, and has to ensure the balance

Cooperation: The Domestic and International Ground of the Global Problems], available at: http://www.globalisneveles.hu/index.php?option=com_content &task=view&id=7&Itemid=6 [cit. 2013-10-07].

[22] TOMAJ, DÉNES: *A nemzetközi fejlesztési együttműködés a szegénység csökkentése érdekében* [The International Development Cooperation in the Interest of Reducing Poverty], Magyar ENSZ Társaság: *Globális kihívások, millenniumi fejlesztési célok és Magyarország*, 2008, ENSZ – Akadémia, 45.

[23] Külügyminisztérium, Nemzetközi Fejlesztési Együttműködési és Humanitárius Segítségnyújtási Főosztály: *Beszámoló Magyarország 2010. évi hivatalos nemzetközi fejlesztési és humanitárius segítségnyújtási tevékenységéről* [Report of Hungary's Official International Development and Humanitarian Activity in 2010], Budapest, 2011, 5. Available at: http://www.kormany.hu/download/1/2d/50000/beszamolo_magyarorszag_2010_evi_nefe_tevekenysegerol.pdf [cit. 2013-05-20].

between general political, security policy and economic policy goals and the practice of development cooperation.[24]

The partner countries of the Hungarian Development Policy can be divided into three main groups: (1) middle-term country strategy with Hungarians' main partner countries like Bosnia-Herzegovina, Moldova, Palestine, Serbia and Vietnam, (2) secondly, according to the international treaty, our country supports the development of Afghanistan and Iraq, and (3) thirdly unique projects with other partners.[25] The main part of Hungarian aids goes to Serbia, Afghanistan and Ukraine, which is 37 % in connection with Serbia and 29% and 17% in connection with Afghanistan and Ukraine.[26]

In order to successfully accomplish the responsibilities of joining the EU, Hungary had to encourage the public and the press. However, our country has to experience that the topic of international development is unpopular in Hungary, only 20% of Hungarians thinks that aiding poorer countries is important, which is less than 30% in East-European countries, while this rate is 74% in Cyprus, 69% in Sweden. The main part of the Hungarian population, nearly 43% think that the EU does not have to deal with international aiding at all.[27]

The civil – non-governmental – organizations (NGOs) proceeded humanitarian activities in 76 countries such as Haiti, Afghanistan and Iraq in the last 5 years in spite of the negative attitude of public and withdrawing politics.

[24] A magyar nemzetközi fejlesztési együttműködési (NEFE) politika [The International Development Policy], available at: http://www.zpok.hu/img_upload/f880a7b608b6eaa8411125e501dc0547/Magyar_NEFE_Politika.doc [cit. 2013-10-07].

[25] TOMAJ: *op. cit.* 46.

[26] *See* 30 milliárdot adunk szegény országoknak, available at: http://www.origo.hu/gazdasag/20130319-ceukutatas-101-mill io-euro-segel yt-adunk-a-szegeny-orszagoknak.html [cit. 2013-10-07].

[27] Alig jut magyar segély külföldre, available at: http://hvg.hu/ itthon/2013 0314_Alig_jut_magyar_segely_kulfoldre [cit. 2013-10-07].

Hungary was encouraged by the world's more developed states for many years but today, it gives 30 billion Hungarian forints aid (equivalent to cca. 100 Million EUR)[28] to poor countries, which is acceptable in its economic situation. To realize the 0.33% Millennium Goals in connection with GNI, in the future Hungary should place development policy in the foreground in order to get suitable attention. The programme should be made popular in public because for a successful development policy it is important to get the public's and press' encouragement in this economic situation and with these restrictions.

4. CONCLUSIONS

Nowadays, globalization dominates in our world and that is why the dependence of states is getting higher and higher. Operating a worldwide program like the International Development Cooperation which is responsible for aiding developing countries is essential in this economic situation. It aims at decreasing poverty, developing education and health care, realizing equal rights, decreasing children mortality, realizing workplaces and solving several urgent problems. The Millennium Goals which were accepted by the UN-member countries in 2000 give the frame and the direction of operating the program, so the way of International Development Cooperation can clearly be seen. Although, only few member countries (which have excellent economic stability) have already realized the planned GNI aiding measurement which was 0.56% and 0.17% in 2010, the flown sum from the member countries is so huge that NEFE has become the most popular program in the world.

[28] Ibid.

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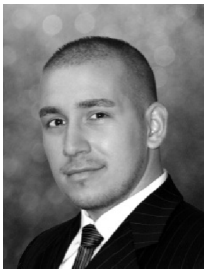


Czebe, András began his legal studies in 2009 at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences where he is currently a senior student. He is known for his student research activities and publications in the area of criminal sciences. His future plans after graduation are: obtaining a PhD degree, becoming a university professor and a successful lawyer.
Email: czebeandras@outlook.com.

Erdős, Csaba (dr. jur., PhD.) received his law degree in 2010 (summa cum laude) from Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. After this he was a full time doctoral student and since 2013 assistant lecturer of the Department of Constitutional Law and Political Sciences. From 2013 he also teaches constitutional law at National University of Public Service. In 2014 he defended his PhD-dissertation called "The Autonomy of the Parliament in Decision-Making: A Study Based on Act-Theory". His main research areas are parliamentary law and constitution-making. E-mail: dr.erdos.csaba@gmail.com.

Fehér, Júlia (dr. jur.) received her law degree in 2013 from Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. After this she was full time doctoral student of the Department of Administrative and Financial Law. From 2013 she also works at a privat school in Budapest. Her main research areaa are the electronic communications and the communications consumer protection.
Email: julia.feher@yahoo.com.

Farkas, Ádám (dr. jur.) received his law degree in 2012 (summa cum laude) from Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. After this he was full time doctoral student and head of Batthyány Lajos College. Since 2013 he is half time assistant lecturer of the Department of Legal History. From 2013 he also works at Ministry of Defence Department for Legal, Codification Section as full time government official, and from 2014 as soldier in second lieutenant rank. His main research area is the military codification of the modern Hungarian state from 1867 to 1914. He is the joint editor of Katonai Jogi és Hadijogi Szemle. Email: farkas.adam@sze.hu.

Gömbös, Csilla was born in Szombathely in 1989. She received her bachelor's degree in International Relations in 2011 at West-Hungarian University in Szombathely. She spent her one-month traineeship in a Hungarian Ministry of Foreign Affairs in 2012. In 2013 she received her master degree in European and international administration at Széchenyi István University in Győr. From 2013 she is a full time doctoral student at Department of International Public- and Private Law at Széchenyi István University. Her main research areas are the institutional development of the EU diplomacy, Common Foreign and Security Policy of the European Union and institutional system of the EU. Email: gombos.csilla89@gmail.com.

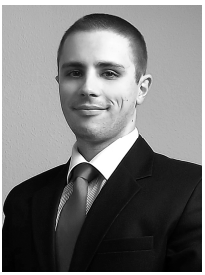
Hegedűs, Laura is a third-year law student at the Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. She is the member of the Batthyány Lajos College and its leading Committee. She is responsible for the cultural and international activities. Since 2012 she is a demonstrator of the Department of Administrative Law and Financial Law. Her main research area is connected to the field of media law. E-mail: laura.hegedus92@gmail.com.

Horváth, István is a fourth-year law student at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. Since spring 2011 he is a member of the Batthyány Lajos College. In the past years he was demonstrator of the Department of Constitutional Law and Political Science. In the academic year 2012/2013, he was awarded with the Fellowship granted by the Republic. Special interests: the relation of labour law and constitutional law and regulation of privacy on the web. Email: horvath.istvan.89@gmail.com.

Kálmán, János (dr. jur.) was born in 1988. He received his law degree in 2012 (summa cum laude) from Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. After this he was full time doctoral student and since 2013 assistant lecturer of the Department of Administrative and Financial Law. Since 2013 he also works at Győr-Moson-Sopron County Government Office and head of Batthyány Lajos College. His main research area is the supervision of financial market. He is the editor of Diskurzus and the reviewer of the scientific periodical US-China Law Review, member of the Hungarian Association of Military Science.
Email: janos.kalman88@gmail.com

Kelemen, Roland is a fourth-year law student at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. Since autumn 2011 he is a member of the Batthyány Lajos College. In the academic year 2013/2014, he is responsible for finance member of the College committee. At present, he is responsible for the scientific activity in the committee. Since 2011 he has been demonstrator of the Department of Legal History. He is a member of the Hungarian Historical Society and the Hungarian Society For Military Law And The Law of War. Special interests: history of law within the military justice system, organization structure of the state (from Reform Age to the present day). Judiciary and various procedures in Hungary between 1867 and 1944. Constitutional law: the constitutional review and the operation of

the Parliament. He interests in the cyber attacks status in the international law. Email: kelemenr85@gmail.com.



Keserű, Barna Arnold (dr. jur.) was born in 1989. He received his summa cum laude degree in law at the Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences in 2012. Since then he is a PhD student at the Civil Law and Civil Procedural Law Department. In 2013 he worked at the City Prosecutor's Office in Győr. He is the deputy manager of the Batthyány Lajos College. His main research area is the connection of the sustainable development and intellectual property rights. He carried out four advanced course by the World Intellectual Property Organization in copyright law, patent law, trademark law and IP management. Email: keserubarna89@gmail.com.

Knapp, László (dr. jur.) received his law degree in 2009 from the Széchenyi István University. After this, he was full time doctoral student at the Doctoral School of Law and Political Sciences of the Széchenyi University, and obtained absolutorium in 2012. Since then, he has been assistant lecturer at the Department of Public and Private International Law. His main research area is the legal personality of the European Union. Email: knapplaszlo@sze.hu.

Krizsán, János obtained his Bachelor degree in 2012 in the field of international administration at Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences. He is currently pursuing his Masters at Széchenyi University, studying European and international administration; besides, he is an associate of Győr-Moson-Sopron County Government Office. His field of research is administrational law, narrowed to administrational labour law and territorial public administration. Email: krjanos@gmail.com.

Pataki, Márta is a fourth-year law student at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. Since autumn 2012 she is a member of the Batthyány Lajos College. In the academic year 2012/2013 she is demonstrator of the Department of Criminal Law Sciences. She won TDK competition in this semester, she was a co-author of a study which won the first place in the international law session. Special interests: she interests in the domestic violence and the cyber attacks international law status.
Email: pmartyka@gmail.com.

Pongrácz, Alex (dr. jur.) received his law degree in 2012 (summa cum laude) from Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. After this he was full time doctoral student of the Department of Theory of Law. His main research area is the globalization and the new "regulatory powers" in the global field of force.
Email: pongracz@sze.hu.

Pongrácz, Dávid third-year law student at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. Since 2013 he is demonstrator of the Department of Constitutional Law and Political Science and since 2012, member of Batthyány Lajos College. His main research area is the limits on freedom of speech, especially the protection of the dignity of communities.
Email: pongi7777@gmail.com.

Szentgyörgyvári, Tamás is a fourth-year law student at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. Since spring 2011 he is a member of the Batthyány Lajos College. At present he is the chairman of the College Committee. He won one TDK competition in spring 2012, and two prizes in the National Conference of Student's Scholarly Circles in Szeged. He is demonstrator at the Department of Legal History. Email: sztomi91@gmail.com.

Trenyisán, Máté is a senior-year-law student at Széchenyi István University Deák Ferenc Facultaty of Law and Political Sciences. Since spring 2010 he is member of the Batthyány Lajos College. He was the chairman of the College Committee (2012-2013). He won two TDK competition in 2010 and 2012, and twice the prize of Fellowship granted by the Republic (2012, 2013). He is a demonstrator at the Department of Commercial, Agricultural and Labour Law. He usually publishes writings with topics of civil and labour law. Email: trenyisan90@gmail.com.

Vulcz, Lilla third-year international administration student of the Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences. She is a demonstrator of the Department of Public- and Private International Law and a member of the Batthyány Lajos College. From 2014 she is the Vice Chairman of Scientific Activities at the European Law Students' Association (ELSA). Her main research area within the international law is the EU's development policy. Email: vlilla91@freemail.hu.